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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO._____MISC.

MICHAEL LEE SMITH,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF MARYLAND

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TO THE COURT OF APPEALS
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Petitioner moves this Court to issue a Writ of Certiorari to review the Judgment and Opinion entered on July 14, 1978 by the Court of Appeals of Maryland.

DECISION BELOW

The Judgment and Opinion of the Court of Appeals of Maryland is reported as No. 98 September Term, 1977, Smith

v. State of Maryland (filed July 14, 1978).A copy of that Judgment and Opinion is attached hereto.

JURISDICTION

Jurisdiction is invoked under Article 28 U.S.C. § 1257(3), and Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

This is an Appeal from the affirmance of the conviction of the Petitioner by the Court of Appeals of Maryland after he had been found guilty of the crime of robbery by the Criminal Court of Baltimore City.

STATEMENT OF FACTS

The Petitioner, Michael Lee Smith, was charged under criminal information number 57609713 with the crime of common law robbery. The Petitioner entered a plea of not guilty and proceeded before the Trial Court sitting without the aid of a jury. Moreover, the Petitioner's attorney advised the Court that there was no real contest as to the facts and submitted same under an agreed Statement of Facts. However, on behalf of your Petitioner, counsel advised the Court that crucial evidence obtained by the State of Maryland was a direct result of a pen register and touch tone decoder which had been placed on the telephone of your Petitioner without the authority or authorization of a search warrant.

Your Petitioner through counsel advised the Court that it was his contention that although a pen register and touch tone decoder did not have to meet the requirements of Title 18 § 2510 it could not be properly attached unless it met the requirements of the Fourth Amendment to the Constitution of the United States preventing illegal searches and seizure not based on probable cause.

After the presentation of facts by the Assistant State's Attorney indicating that the key evidence against your Petitioner was derived from the pen register device the Court ruled that the installation of said device did not require prior authorization through search and seizure warrant procedures and as such the evidence obtained was properly admitted. A judgment of guilty was entered and your Petitioner was sentenced to six years under the jurisdiction of the Department of Correctional Services.

Within the proper guidelines and standards set up by the Maryland Rules of Procedure appeal was entered to the Court of Special Appeals of Maryland. However, the Court of Appeals of Maryland (the highest Appellate Court of the State of Maryland) issued a Writ of Certiorari on its own Motion and considered the case without the benefit of the Court of Special Appeals. The reason why the highest Appellate Court of Maryland took such action was apparently the fact that this was a new issue in this State; that it had been decided differently by several

of the Federal Circuits; and it appeared at the time that the same issue was pending before the Supreme Court of the United States. The Court of Appeals of Maryland requested that additional Briefs be filed and that arguments be heard on two separate occasions before rendering an opinion. The Opinion by the Court of Appeals confirming the conviction of your Petitioner was a four-three decision and contained several strong dissents. It is from this affirmance of the conviction of your Petitioner that a Petition for Writ of Certiorari is sought.

QUESTION PRESENTED

Does the installation of a pen register or touch tone decoder without a Court Order or search warrant violate the Fourth Amendment to the Constitution of the United States.

REASON FOR ALLOWANCE OF THE WRIT

The question presented above has been considered by various Circuits throughout the United States and one would have to admit that a variance of opinion exists between them. As will be illustrated from the arguments hereinafter presented, the Second, Seventh and Eighth Federal Circuits have agreed that in order to install a pen register device the requirements of the Fourth Amendment and a showing of probable cause are required. To the contrary, the Fifth Circuit in United

State v. Clegg, 509 F.2d 605 (5th Circuit 1975) espouses a different opinion. The State of Maryland would also argue that the Ninth Circuit has followed the leadership of the Fifth Circuit in the case of Hodge v. Mountain States Telephone & Telegraph Company, 555 F.2d 254 (Ninth Circuit 1977). With this your Petitioner would not agree as the later case involved a civil suit for damages but your Petitioner would agree that it does serve to illustrate the fact that the Circuits throughout these United States are in disagreement as to the issue raised in the case at hand. It is the Petitioner's position that those cases which suggest and mandate that prior to a pen register (or touch tone decoder) being properly appended to a person's telephone, the requirements of the Fourth Amendment to the Constitution of the United States requiring a showing of probable cause be met are the more valid and well recent opinions. Moreover, by way of dicta your Petitioner believes that this Court has also expressed the opinion and position maintained by the Second, Seventh and Eighth Circuits.

> "Because a pen register device is not subject to the provisions of Title III, the permissability of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment." In this case the Government secured a court order, the equivalent for this purpose of a search warrant, for each of the two extensions of its authorization to use a pen register." U.S. v. Giordano, 416 U.S. 505 at 553-554 94 S.Ct. at 1844-45.

This statement by Mr. Justice Powell in United States v. Giordano, supra, would seem to be dispositive of this issue. Such has been the holding of the various Circuit Courts of Appeals throughout the country:

> "We take this statement [Justice Powell in Giordano] to mean that a pen register order involves a search and seizure under the Fourth Amendment and that a Court may issue such an order only upon a showing of probable cause."
>
> "Moreover, relying principally on Justice Powell's statement in United States v. Giordano, supra, we agree with the Seventh Circuit that a pen register order may only be issued after a showing pf probable cause." Application of an Order Authorizing the Use of a Pen Register, 528 F.2d 956, Second Circuit.

Also:

> "The District Court entered that part of its order based upon an affidavit signed by a special government agent which established probable cause for believing that evidence of the commission of violations of the Internal Revenue Code would be obtained by using a pen register. Such an accommodation for issuing an order for the use of a pen register was cited with apparent approval by Mr. Justice Powell in United States v. Giordano," United States of America v. Illinois Bell Telephone Company, 531 F.2d 809, Seventh Circuit.

And again:

> "It is our view that the propriety of a pen register's usage depends entirely upon compliance with the Fourth Amendment rather than Title III."

> "We conclude that the District Court's approach with all the attendant Fourth Amendment safeguards was a valid exercise of authority." Application of the United States for Order Authorizing Installation and Use of a Pen Register, United States of America v. Southwestern Bell Telephone Company, 546 F.2d 243 Eighth Circuit.

To the same effect:

> "In this situation it has been held that a pen register order based upon a showing of probable cause even if considered to be a search is not constitutionally offensive. The propriety of their use depends entirely upon compliance with the Fourth Amendment." United States of America v. Nick John, et al, 508 F.2d 1134, Eighth Circuit.

And lastly:

> "Because the orders authorizing the installation of pen registers satisfied the probable cause requirement of the Fourth Amendment, it is not necessary to decide whether their use constitutes a search." United States of America v. Brick, 502 F.2d at 223.

The great weight of authority from the various Federal Circuits indicate that before a pen register can properly be placed on a person's phone, a Court Order authorizing said installation must be obtained; said authorization being based upon probable cause. When one reviews the dissents that are found in these various cases, it is apparent that these opinions express the rationale that stronger showing be made before said invasion is permitted. It is the feeling of the majority, that compliance with Fourth Amendment requirements is sufficient to protect the persons involved. To the

contrary, the minority believe that the only way to protect the privacy of the individuals is to require compliance with Title III.

Perhaps the strongest wording by a dissent on this issue is found in the most recent case of United States of America v. New York Telephone Company decided by the Supreme Court on December 7, 1977. The dissent was written by Mr. Justice Stevens with whom Mr. Justice Brannan and Mr. Justice Marshall joined. These three justices espouse the doctrine that Federal Courts possess limited jurisdiction. They recognize that:

> "The principle of limited federal jurisdiction is fundamental; never is it more important than when a Federal Court proports to authorize and implement the secret invasion of an individual's privacy."

It is apparent to the dissenters that the use of a pen register no matter how authorized, is a secret invasion into an individual's privacy. Thus, the question becomes one of under what circumstances can that privacy be invaded.

The dissent then goes on to say:

> "Yet that principle was entirely ignored on March 19 and April 2, 1976 when the District Court granted the Government's application for permission to engage in surveillance by means of a pen register and ordered the respondent to cooperate in the covert operation."

Again it is apparent to the dissent that the procedure followed in authorizing the secret invasion into the individual's privacy was not sufficient under the circumstances of the case. The dissent suggests that the mere adherence to the requirements of the Fourth Amendment and obtaining a Court Order based on probable cause do not provide a sufficient basis upon which to invade the privacy of an individual. These persons would cry for more.

This Court, then, has three questions to answer. First, should the installation of a pen register require the fulfillment of the standards contained in Title III of the Omnibus Crime Bill. The answer to that is clearly "no". Secondly, should the installation of a pen register device be allowed indiscriminately without any judicial authorization? The answer to this is likewise, "no". Exactly for the reasons expressed by the dissent in United States of America v. New York Telephone Company and the other comments made by the various Judges and Justices in the cases heretofore cited, an indiscriminate "secret invasion of an individual's privacy" cannot be permitted.

Thirdly, does compliance with Fourth Amendment requirements satisfy the need to protect the individual's privacy on the one hand and yet provide law enforcement officers with sufficient latitude to properly conduct their duties. The answer to that question is "yes". By requiring that law enforcement officers adhere to the requirements of the

Fourth Amendment, an indiscriminate use of police power is avoided. The individual can safely rely on his right of privacy. On the other hand, law enforcement officers who have probable cause to believe a crime or crimes will be committed by the use of a telephone and the discovery of same can be detected by the use of a pen register, can apply to a judicial officer for the installation of this electronic device. Law enforcement will not be hampered and the individual is secure.

Thus it is apparent that there is a divergence of opinion throughout the United States as to the proper means of installing a pen register device. Law enforcement officers throughout the country are in need of direction from this, the highest Court of the land. It is with this thought in mind i.e. the need for uniformity among law enforcement agencies and the proper application by them of law enforcement procedures that this Court must now resolve key issues. In doing so that portion of the dissent by Judge Cole is highly relevant:

> "The question actually before us, then, is whether police interception of the information from Smith's telephone (certain numbers dialed) by means of a pen register, was a "search".1

1/ Two federal circuits have held that the use of a pen register constitutes a search. See United States v. Southwestern Bell Telephone Company, 546 F.2d 243 (8th Cir. 1976); Application

"A 'search' in the constitutional sense has three components: it is (1) an invasion into otherwise private or concealed areas or matters (2) by the government (3) exploring for evidence of guilt in a criminal prosecution. See Von Lusch v. State, Md. App. , A.2d (1978) [No. 1069, September Term, 1977, decided June 9, 1978]; Minnick v. State, 4 Md. App. 81, 241 A.2d 153 (1968); Kleinbart v. State, 2 Md. App. 183, 235 A.2d 288 (1967). Other courts have adopted similar definitions of the term 'search'. See, e.g., United States v. Lisk, 522 F.2d 228 XXXX (7th Cir., 1975), cert. denied, 423 U.S. 1078 (1976); United States v. Davis, 482 F.2d 893 XXXX (9th Cir. 1973); Marshall v. United States, 422 F.2d 185 (5th Cir. 1970); State v. Tully, 166 Conn. 126, 348 A.2d 603 (1974); State v. Ashby, 245 So. 2d 255 (Fla. 1971); Alcorn v. State, 255 Ind. 491, 265 N.E.2d 413 (1970); State v. Person, 34 Ohio Misc. 97, 298 N.E.2d 922 (1973); State v. Cundy, 201 N.W.2d 236 (S.D. 1972), cert. denied, 412 U.S. 298 (1973); Long v. State, 532 S.W.2d 591 (Tex. Crim. App. 1975), cert. denied, 425 U.S. 937 (1976). Especially concise is the definition in Davis, supra, at 896-97:

(Footnote One continued)

of U.S. in Matter of Order, 538 F.2d 956 (2d Cir. 1967), rev'd on other grounds, sub nom. United States v. New York Telephone Company., U.S. , 98 S.Ct. 364, 54 L.Ed.2d 376 (1977). Dicta from other circuits endorse the views of Mr. Justice Powell in United States v. Giordano, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) (concurring and dissenting opinion). See United States v. Illinois Bell Tel. Co., 531 F.2d 809 (7th Cir. 1976); United States v. John, 508 F.2d 1134 (8th Cir.), cert. denied, 421 U.S. 962 (1975); United States v. Falcone, 505 F.2d 478 (3rd Cir. 1974), cert. denied, 420 U.S. 955 (1975).

'[S]earch is a functional, not merely a physical, process.' Lustig v. United States, 338 U.S. 74, 78, 69 S.Ct. 1372, 1374, 93 L.Ed. 1819 (1949). A search begins with the planning of the invasion and continues 'until effective appropriation' of the fruits of the search 'for subsequent proof of an offense.' Id. The Fourth Amendment applies to a search whenever the government participates in any significant way in this total course of conduct. 'The decisive factor... is the actuality of a share by a[n]... official in the total enterprise of securing and selecting evidence by other than sanctioned means.'

A 'search', therefore is a step in a criminal investigation by the government which focuses on the gathering of information or clues relevant to prosecution.

Information is not restricted to the contents of oral communication. In many situations non-verbal action may be more explicit and highly relevant to a criminal investigation. Such signals may be a command to bet or not to bet, to print or not to print, to preserve or to destroy, or indeed, to stay or flee. It is only left to the investigator to understand the question being answered. I agree with the majority that conversation is protected under the teachings of United States v. Katz, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). However, information received from monitoring Smith's telephone is also entitled to protection. Technologically, a distinction between verbal and digital transmissions is absurd. There can be no doubt that the fact that Smith made certain calls from his home telephone is highly relevant information in a criminal prosecution for obscene or annoying phone calls.

The 'government action' part of the definition of a 'search' is satisfied in Smith's case because the telephone company attached the pen

register to Smith's line at the request of the police and was not ordered to do so by a court or acting under compulsion of a warrant. In essence, the telephone company, not conducting an independent investigation of its own, assumed the role of an agent of the government in conducting a warrantless search. The majority cites cases which on this point are inapposite. The surveillance of the defendants' telephone in Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254, 256 n. 3 (9th Cir. 1977); United States v. Harvey, 540 F.2d 1345 (8th Cir. 1976); United States v. Clegg, 509 F.2d 605 (5th Cir. 1975); Nolan v. United States, 423 F.2d 1031 (10th Cir. 1969); cert.denied, 400 U.S. 848 (1970); and Brandon v. United States, 382 F.2d 607 (10th Cir. 1967) was conducted solely by the telephone companies, independent of government agencies.[2] Furthermore, in United States v. Baxter, 492 F.2d 150 (9th Cir.), cert. dismissed, 414 U.S. 801 (1973); DiPiazza v. United States, 415 F.2d 99 (6th Cir. 1969), cert. denied, 402 U.S. 949 (1971); and United States v. Covello, 410 F.2d 536 (2d Cir.), cert. denied, 396 U.S. 879 (1969), no pen registers or blue boxes were ever used; government agencies merely subpoenaed the toll or long distance billing records routinely kept by the telephone company. United States v. Fithian, 452 F.2d 505 (9th Cir. 1971), also involved the exercise of governmental power to subpoena telephone company records rather than governmental or telephone company surveillance of the making of calls, although the opinion is unclear as to whether the documents recorded local or toll calls, or both.[3]

2/ Although not cited by the majority in this case, two other recent Ninth Circuit decisions specifically excluded Fourth Amendment considerations because monitoring activities were conducted by telephone companies, independent to the government. See United States v. Bowler, 561 F.2d 1323 (9th Cir. 1977); United States v. Glanzer, 521 F.2d 11 (9th Cir. 1975) (per curiam).

3/ In the case sub judice the police obtained information about all of Smith's outgoing calls, not just long-distance or toll calls, as in Baxter, DiPiazza, and Covello, supra.

The 'invasion of privacy' prong of the definition of a 'search' is also met in this case. While telephone companies routinely maintain records of toll and long distance calls for billing purposes, or monitor a telephone line to correct problems with services, or deal with customer complaints, local calls made by Smith on his home phone are a private matter. Routine telephone company activities do not include the monitoring of local calls because customers usually pay for basic use of equipment at a flat rate. Nor would the government routinely be privy to information concerning Smith's private local calls absent a warrant.

The majority contends that a legal distinction between telephone customer expectations regarding local calls and toll calls cannot be made because subscribers have no real knowledge as to the geographic boundaries of their local calling area. This amounts to mere speculation as to what the average telephone customer knows. In addition, in Maryland, a person using the telephone must have some knowledge of his local calling zone because a special number prefix, '1', must be dialed in order just to complete in-state calls which are made to telephones outside one's local calling zone. It is also difficult to agree with this argument because it assumes that telephone subscribers are so unconcerned about the amount of their monthly bills that they pay no attention to whether they are making toll calls.

(Footnote Three continued)

The majority attempts to minimize the significance of these factual distinctions by quoting a portion of Hodge, supra, in which, without citing any authority other than its own opinion, the Ninth Circuit stated that the difference between a pen register's recording of all attempted outgoing calls and a telephone company's routine records of completed toll and long distance calls is not of constitutional dimension. See Hodge, supra, 555 F.2d at 256-57 and n.6.

Second, the majority suggests that since all telephone calls must pass through equipment owned by the telephone company, the telephone company will have knowledge of the fact that calls were made. The majority then attempts to construct an analogy between the facts in this case and prior cases holding that transfer of information to the government by a 'wired' informant, United States v. White, supra, or by a bank, United States v. Miller, 425 U.S. 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976), or by means of 'mail covers', e.g., United States v. Leonard, 524 F.2d 1076 (2d Cir. 1975), cert. denied, 425 U.S. 958(1976), or by observation in a public area, e.g., United States v. Hufford, 539 F.2d 32 (9th Cir.), cert. denied, 429 U.S. 1002 (1976), did not violate the Fourth Amendment because those defendants had no constitutionally protected expectations of privacy when they gave information to the person(s) who ultimately turned the information over to the government.

This analogy just does not hold water. In White, supra, a conversation between the defendant and an informant was relayed by the informant to the police by means of an electronic transmitter that the informant was wearing. The majority opinion in White stressed that because the revelation to the government was made by a 'party' to conversation with the defendant, the defendant had no justifiable or constitutionally protected expectation of privacy concerning the conversation. 401 U.S. 745 at 749. I cannot agree that the telephone company in this case was a 'party' to Smith's calls in the same sense as the informant in White. Smith did not speak to the telephone company in the direct manner that White spoke to the informant. The telephone company was 'neutral' in the telephone call. See California Bankers Association v. Shultz, 416 U.S. 21, 48-49, 94 S. Ct. 1494, 39 L.Ed. 2d 812 (1974). Smith was leasing the telephone in order to make private calls from his home. If Smith had known that a pen register would be attached to his phone merely at the request of the police, without a warrant, he would have little reason to lease a 'private' home phone.

A home phone would afford him little more privacy than a public phone.

Similarly, in Miller, supra, the Supreme Court held that because the defendant's bank was a 'party' to the instruments negotiated by the defendant, the bank's revelation of information about the defendant's accounts upon government subpoena did not implicate the Fourth Amendment. 425 U.S. 435 at 440. According to the Court, the defendant had no reasonable expectation of privacy in that situation. Once again, I cannot agree that the telephone company is a 'party' to its customers' telephone conversations in the same sense in which a bank operates with regard to its customers' negotiable instruments, so as to render unreasonable Smith's expectation of privacy in the use of his home phone. Even if the majority's analogy to Miller is valid, (and I do not agree) and Smith should have expected that the telephone company could itself monitor his phone for billing purposes, to improve service to its customers, or to verify complaints, Smith nevertheless had a reasonable expectation that the telephone company would not, without the safeguards of appropriate legal process, act for the government in collecting information relevant to a criminal prosecution. See California Bankers Association v. Shultz, supra, 416 U.S. 21 at 52.

The majority's analogy to 'mail covers' is also unconvincing. While use of the postal service involves essentially public facilities where any writing on the outside of an envelope or on a postcard can be easily read by postal employees, telephones are placed in the home to provide privacy regarding the parties to and content of a conversation. The Supreme Court has repeatedly acknowledged the aura of privacy which surrounds activities in the home, as contrasted with 'public' activities. See, e.g. United States vs. Martinez-Fuerte, 428 U.S. 543, 561, 96 S. Ct. 3074, 49 L.Ed.2d 1116 (1976) (Fourth Amendment context). The decision in Miller, supra, does not preclude this type of analysis because the Court in Miller expressly based its decision on the assumption that the documents subpoenaed were not the respondent's 'private

papers.' Miller, supra, 425 U.S. 435 at 440. Unlike Miller, who voluntarily gave information to another 'party' to his commercial transactions, his bank, and never operated on the assumption that the information was private, defendant Smith sought to maintain his privacy regarding his phone calls by placing them in his home. In contrast to the majority, I believe that the use of 'mail covers' is less of an invasion of privacy that a pen register. The address and return address on an envelope are easily visible to anyone handling it, while use of a home phone is designed to make telephone communications a much more private matter.

The same argument also shows the weakness of the majority's reference to observations made on a public highway by the police. Smith placed these calls on his home telephone precisely to avoid 'knowingly exposing' information to the public, as did the defendants in Hufford, supra, and in United States v. Moore, 562 F.2d 106 (1st Cir. 1977).

The ultimate issue to be resolved in whether the warrantless search through electronic detection placed upon Smith's telephone violated the Fourth Amendment. The test that must be applied is one of the reasonableness of the search:

> '[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'

Katz, supra, 389 U.S. 347 at 361; Venner v. State, 279 Md. 47, 52, 367 A.2d 949, cert. denied, 431 U.S. 932 (1977).

While I would agree with the majority that it is difficult to know whether a telephone subscriber harbors an actual subjective expectation of privacy in the numbers which he dials, I would contend that the facts in this case clearly support an inference that

Smith had an expectation of privacy in the local calls he made. As previously stated, a phone call placed in the home would demonstrate an expectation of privacy, in contrast to one placed from a public phone or a private phone located in someone else's home. In addition, the telephone company does not usually keep records of every local call for routine billing or service purposes. At the very least, Smith certainly had an expectation that the telephone company would not act as a government agent in monitoring his calls for purposes of a criminal investigation without appropriate legal process. That such expectation is reasonable seems undebatable.

Finally, the majority dismisses Smith's contention rather summarily by stating that '[e]ven if he did harbor such an expectation, we are not prepared to say on the record before us that it is one that society would recognize as reasonable and constitutionally protected.' I emphatically disagree.

Not only is society prepared to recognize this expectation of privacy in the use of one's home telephone but society would welcome the fact that this Court would declare its recognition of the right and protect it. Stated differently, I do not believe anyone in our society would be surprised to learn that the police were illegally tapping phones, examining mail or otherwise engaging in unlawful snooping. However, they would be shocked to learn that this Court or any other court condoned, tolerated or put its stamp of approval on such practices.

The majority fails to give due weight to the impact of Watergate and its progeny, the recent revelations of illicit surveillance conducted by the F.B.I. upon activities of various civil rights, labor and political leaders, or indeed, the potential abuse to which the pen register may be put by police authorities.[4] These factors and others have created an environment of distrust, fear and lack of confidence.

I believe society condemns any such unlawful practice and awaits the forces of good to restore the basic right of privacy which has been steadily

eroded. I believe that each citizen still clings to the notion that while being deprived of his privacy, he still has the right to it and relies upon the courts to safeguard that privacy from warrantless intrusion.

Lest we forget, the heart of the Fourth Amendment is to protect citizens against every unjustifiable intrusion by the state upon their privacy, whatever the means employed. For the Fourth Amendment to remain viable, it must adjust to the times and afford protection against new forms of invasions of privacy, however sophisticated and whether they are generated through electronics or even advances in the psychic or related sciences.

In the instant case, no such intrusion was legal without proper review of a magistrate. I would recognize Smith's right of privacy and suppress the fruits of the warrantless search."

4/ A pen register may be subject to abuse because it may be easily converted into a wiretap by attaching headphones or a tape recorder to appropriate terminals on the pen register unit. Newer models of pen registers have automatic voice actuated switches which can automatically turn a tape recorder on and off as the telephone is used. See Note, Circumventing Title III, The Use of Pen Register Surveillance in Law Enforcement, 1977 Duke L. J. 751, 759. The pen register also has the potential of inhibiting freedom of association. If pen register data were fed into a central computer on a widespread basis, patterns of acquaintances and dealings among a substantial group of people would be available to the government. A. Miller, Assualt on Privacy, supra. at 43.

CONCLUSION

For the reasons heretofore cited and in reliance upon the legal authorities hereinabove set forth it is respectfully submitted that a Writ of Certiorari to the Court of Appeals of Maryland be issued herein.

CARDIN & GITOMER
HOWARD L. CARDIN

Attorneys for Petitioner

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No. 78-5374

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 98

September Term, 1977

MICHAEL LEE SMITH

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Digges
Levine
Eldridge
Orth
Cole,
JJ.

Opinion by Murphy, C.J.
Digges, Eldridge and Cole, JJ., dissent

Filed: July 14, 1978

Whether electronically obtained evidence was improperly admitted at the appellant Smith's criminal trial in violation of state law and the federal constitution is the central issue in this case.

Smith was charged with having robbed Patricia McDonough on March 5, 1976. Evidence adduced at the trial showed that the victim was returning to her home shortly after midnight on the morning of the crime when she observed a man in her neighborhood changing a tire on a 1975 Monte Carlo automobile with a dark green bottom and a tan top. As Miss McDonough approached her home, she was suddenly grabbed from behind and her pocketbook forcibly taken from her. In the course of the robbery, the victim had a full-face view of the robber and promptly gave Officer Kenneth Lucas a description of her assailant and of the 1975 Monte Carlo automobile.

Shortly after the crime was committed, Miss McDonough received a threatening and obscene telephone call from an individual who identified himself as the person who had robbed her. She thereafter received a series of such calls from the robber and so advised the police. Unknown to the police, a friend of Miss McDonough, Walt Heline, had attached a recording device to her telephone and instructed her how to tape the robber's conversation when he called. After Miss McDonough taped three or four calls from her assailant, she informed the police that she had recorded the conversations, and eventually xxx gave the tapes to them.

In the meantime, on March 13, at the request of the police, the telephone company, at its central office, installed terminating accounting equipment on the victim's telephone line in an effort to determine the origin of the calls she was receiving from the robber. As a result, it was ascertained that some of the calls were being made from pay phones in the immediate vicinity of the victim's home. Earlier, the victim had advised the police that she thought one of the calls had been made from a telephone at a private residence.

On March 15, Miss McDonough received a call from the robber requesting that she step out on her porch so that he could see her. She did so and observed the 1975 Monte Carlo which she had earlier described to the police, driving slowly by her home.

Officer Lucas, to whom the victim had originally reported the crime, was on the lookout for a man fitting the description of the robber and of the described vehicle. On March 16, in the general vicinity of the victim's home, the appellant Smith stopped Lucas and sought his assistance in opening the locked door of his 1975 Monte Carlo. Lucas took the license number of the vehicle, learned that it was registered to the appellant Smith, and so notified other investigating police officers.

On March 17, the telephone company, at the request of the police, installed a pen register[1] at its central offices to record

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1. A pen register was well described by Justice Powell in United States v. Giordano, 416 U.S. 505, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (1974), as follows:

> "A pen register is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers

the phone numbers of calls made from the telephone at Smith's residence. On March 17, a call was made from Smith's residence to the victim's home. The police thereafter obtained a search warrant to search Smith's automobile and residence. The search of the residence revealed that a page in Smith's telephone book was turned down; it contained the name and number of the victim. On March 19, the victim viewed a six-man line-up at police headquarters and identified the appellant Smith as the man who robbed her.

In pretrial motions, Smith had sought to suppress the evidence obtained by the tape recordings and the pen register; he also moved to suppress the line-up identification. He contended that the attachment of the recording device to the victim's telephone without a court order violated Maryland Code (1957, 1976 Repl. Vol.) Art. 27, § 125A (a); under that section, it is a misdemeanor "for any person in this State to use any electronic device . . . to overhear or record any part of the conversation or words spoken to or by any person in private conversation without the knowledge or consent . . . of that other person." He also contended that the recording device attached to the victim's phone violated Code (1974), § 10-402 of the Courts and Judicial Proceedings Article that section prohibits a person from obtaining "the whole or any part of a telephonic . . . communication

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1. (contd.)

> dialed from that line. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations. . . ." 416 U.S. at 549.

to which the person is not a participant by means of a device . . . unless consent is given by the participants." Appellant further contended that the evidence resulting from the installation of the pen register should be suppressed because its obtention was based on information gleaned from the unlawful tape recordings of the telephone conversations. He also argued that the pen register constituted an unlawful "interception" of a telephonic communication forbidden by § 10-402 of the Courts Article. He furthermore maintained that, absent a court order or search warrant, the use of the pen register constituted an illegal search and seizure in contravention of the fourth amendment to the federal constitution. Finally, Smith argued that without the illegally obtained electronic evidence he would not have been arrested, required to appear in a line-up and identified by the victim. He therefore claimed that the line-up identification should also be suppressed, but he withdrew this contention before the trial judge acted on his motions.

The trial judge overruled the motions to suppress, and the electronically obtained evidence was admitted. Smith was found guilty of robbery and sentenced to ten years in prison. We granted certiorari prior to decision by the Court of Special Appeals to review the important issues raised in the case.

(1)

The Tape Recorded Telephone Conversations

At the trial, the State conceded that the recording of the

telephone conversations violated § 125A of Art. 27. It maintained that the tape recordings were nevertheless admissible in evidence because the only sanction prescribed by the statute was criminal prosecution of those who violate its provisions. The Court of Special Appeals so held in Reed v. State, 35 Md. App. 472, 372 A.2d 243 (1977), and Farrington v. State, 19 Md. App. 253, 310 A.2d 817 (1973), cert. denied, 271 Md. 742, cert. denied, 419 U.S. 1019 (1974). The appellant does not challenge that interpretation of the statute, and we therefore have no occasion to consider the question in this case.

Appellant claims instead that the attachment to the victim's phone of the recording device without a court order constituted an illegal "interception" of a telephonic communication in contravention of § 10-402 of the Courts Article.

Until its repeal by ch. 692 of the Acts of 1977,[2] § 10-402 was part of the Maryland Wire Tapping Act, §§ 10-401 through 10-408 of the Courts Article, in effect at the time of the appellant's arrest and prosecution. That Act declared in § 10-401 that the right of the people to be secure against "unreasonable interception of telephonic . . . communications may not be violated." It expressed the legislative mandate that the "interception and divulgence of a private commu-

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2. Chapter 692 repealed the Maryland Wire Tapping Act and Art. 27, § 125A; in its place it enacted a new statute comprehensively regulating the interception of wire and oral communications. The new statute became effective on July 1, 1977 and is codified as Maryland Code (1974, 1977 Cum. Supp.) §§ 10-401 through 10-412. The Act closely parallels Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. Both the state and federal statutes make it unlawful, with certain exceptions, to intercept "any wire or oral communication," as those terms are therein defined, and each contains a provision making all evidence obtained in violation of the statute inadmissible in court.

nication by any person not a party thereto is contrary to the public policy of the state. and may not be permitted except by court order in unusual circumstances to protect the people." Section 10-402(a) makes it unlawful, absent a court order, for any person to obtain a telephonic communication to which he is not a participant by means of any device unless consent is given by the participants. Section 10-406 provides that evidence obtained in violation of the Maryland Wire Tapping Act is inadmissible in court.

The appellant relies on Robert v. State, 220 Md. 159, 151 A.2d 737 (1959), as authority for the exclusion of the tape recordings under § 10-402(a). In Robert, police officers, anticipating that the defendant would make a phone call to certain friends in a motel, positioned themselves at the motel's telephone switchboard. When the expected call came through the switchboard, the officers monitored it by means of a headset connected through a press key to the switchboard. After observing that the officers could not be classified as participants in the conversation, and that they overheard it without the consent of all of the participants, our predecessors held that the headset was an electrical device by which the officers obtained the telephone conversation in contravention of the Act's provisions, rendering the evidence thereby obtained inadmissible in court.

Robert is plainly inapposite on its facts. There, the police officers were not participants in the conversation. In the present

case, Miss McDonough was a participant in the conversations which she recorded. There is no requirement in § 10-402(a) that consent to the recording must be given by all participants in the conversation. Consequently, there was no violation of § 10-402(a), although mainly the recording of the conversations violated Art. 27, § 125A. Cf. Clark v. State, 2 Md. App. 756, 237 A.2d 768 (1968), cert. denied, 394 U.S. 1001 (1969).

Appellant's suggestion that it was Heline and not the victim who recorded the conversations is not supported by the record. Nor is there any evidence to support Smith's claim that in attaching the recording device to the victim's phone Heline acted as a police agent. Simply because the police learned, after the fact, that the device had been attached to the victim's phone, but did not require its removal, does not warrant a finding that § 10-402(a) was violated. Finally, there is no justification for Smith's reliance on Commonwealth v. McCoy, 442 Pa. 234, 275 A.2d 28 (1971), and Cameron v. State, 365 P.2d 576 (Okla. 1961), to establish that § 10-402(a) was violated by the recording of the conversations; the statutes involved in those cases were markedly different from § 10-402(a) and therefore are not applicable in this case.

(2)

The Pen Register

We find no merit in the argument that the installation of the pen register at the central offices of the telephone company to

record the phone numbers of outgoing calls made from Smith's residence telephone constituted the "interception" of a telephonic communication in violation of § 10-402(a).

The Supreme Court held in United States v. New York Telephone Co., U.S. , 98 S. Ct. 364, 54 L. Ed. 2d 376 (1977), that a pen register is not encompassed within the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. That Act, which comprehensively regulates wiretapping and electronic surveillance, requires a court order authorizing or approving the interception of a wire or oral communication. The term "intercept" is defined in § 2510(4) of the statute to mean "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." The Supreme Court said that pen registers are not within the statute because they are not devices used to intercept oral or wire communications, i.e., they do not "intercept" because they do not acquire the "contents" of a communication, as that latter term is defined in § 2511(8). The Court said:

> "Indeed, a law enforcement official could not even determine from the use of a pen register whether a communication existed. These devices do not hear sound. They disclose only the telephone numbers that have been dialed--a means of establishing communication. Neither the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed are disclosed by pen registers. Furthermore, pen registers do not accomplish the 'aural acquisition' of anything. They decode outgoing telephone numbers by responding to changes in electrical voltage caused by the turning of the telephone dial (or the pressing of buttons on push button telephones) and present the information in a form to be interpreted by sight rather than by hearing." 98 S. Ct. at 369-70.

Although the verbiage of § 10-402(a) differs from the federal statute, the prohibitions underlying each law require the "interception" of a communication. We conclude, as did the Supreme Court in New York Telephone, and most federal courts which have considered the question,[3] that a pen register is not a device which "intercepts" a telephonic communication. Accordingly, the use of the pen register did not violate § 10-402(a).

Since the evidence procured by recording the telephone conversations which the victim had with her assailant was properly admitted at the trial, Smith's alternative argument that the pen register evidence must be suppressed as an illegal derivative use of the recorded telephone conversations is also lacking in merit. Cf. Everhart v. State, 274 Md. 459, 337 A.2d 100 (1975); Carter v. State, 274 Md. 411, 337 A.2d 415 (1975).

Appellant next contends that pen register surveillance constitutes a search subject to the warrant requirements of the fourth amendment. Since no warrant or court order was obtained authorizing the installation of the pen register, Smith claims that the

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3. See, e.g., United States v. Illinois Bell Tel. Co., 531 F.2d 809 (7th Cir. 1976); United States v. Southwestern Bell Telephone Co., 546 F.2d 243 (8th Cir. 1976); United States v. Falcone, 505 F.2d 478 (3rd Cir. 1974), cert. denied, 420 U.S. 955 (1975).

evidence which the pen register produced, and all evidence derived from its use, must be suppressed. The State, on the other hand, contends that the better-reasoned cases support the view that pen register surveillance is not a search within the fourth amendment and that a warrant is not required to install such a device. Substantial authority exists for each position.

In Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), the Supreme Court held that evidence obtained without a warrant by government agents of words spoken by the defendant in a telephone conversation, which the agents overheard by attaching an electronic listening device to the outside of a public telephone booth from which the defendant had placed a telephone call, violated the fourth amendment. It held, overruling Olmstead v. United States, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928), that the fourth amendment governs not only the seizure of tangible items, but also the recording of oral statements overheard, even in the absence of a technical trespass against local property law. It said that the fourth amendment protects people, and not merely places, against unreasonable searches and seizures; that it protects "individual privacy against certain kinds of governmental intrusion"; that what a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection; but that what he seeks to preserve as private may be constitutionally protected. The Court said that while the fourth amendment cannot be translated into

a general constitutional right to privacy, the activities of the government agents violated "the privacy upon which [the defendant] justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." 389 U.S. at 353.

The admissibility of evidence obtained by use of a pen register was considered in United States v. Giordano, 416 U.S. 505, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (1974). There, court orders had been issued authorizing interception of wire communications and the installation of a pen register, and these orders were subsequently extended. The application to extend the pen register detailed the contents of conversations intercepted pursuant to the wire interception orders. The Court held that the wire interception orders were invalid since they had not been authorized in conformity with the controlling federal statute. It further held that evidence gathered under the pen register extension order was inadmissible because tainted by the use of the unlawfully intercepted wire communications to secure judicial approval to extend the pen register surveillance order. The Court did not hold that use of a pen register requires compliance with the warrant requirements of the fourth amendment, although that result might be implied in view of the decision to exclude the evidence which the pen register produced.

In a concurring and dissenting opinion by Justice Powell, in which the Chief Justice and Justices Blackmun and Rehnquist joined,

it was pointed out that there was no dispute that the pen register order was based on probable cause and lawful under the fourth amendment. In this context, Justice Powell stated: "Because a pen register device is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment." 416 U.S. at 553-554. That Justice Powell would not have decided the constitutional issue is, however, clear from his further statement, appearing at footnote 4, 416 U.S. at 554: "The Government suggests that the use of a pen register may not constitute a search within the meaning of the Fourth Amendment. I need not address this question, for in my view the constitutional guarantee, assuming its applicability, was satisfied in this case." Justice Powell concluded that the pen register extension order was valid, because based only in part on the unlawfully intercepted wire communications, and that the evidence gathered by the device was admissible.

Relying on Justice Powell's statement to support the proposition that the use of a pen register depends on compliance with the requirements of the fourth amendment, the court in Application of U.S. in Matter of Order, Etc., 538 F.2d 956 (2nd Cir. 1976), stated at 959: "We take this statement to mean that a pen register order involves a search and seizure under the Fourth Amendment, and that a court may issue such an order only upon a showing of probable cause." A number of other courts have reiterated Justice Powell's statement concerning pen

registers and compliance with the fourth amendment. See United States v. Illinois Bell Tel. Co., 531 F.2d 809 (7th Cir. 1976); United States v. Dolittle, 507 F.2d 1368 (5th Cir.), cert. dismissed, 423 U.S. 1008 (1975); United States v. John, 508 F.2d 1134 (8th Cir.), cert. denied, 421 U.S. 962 (1975); United States v. Brick, 502 F.2d 219 (8th Cir. 1974). Although each of these cases states that the propriety of the use of a pen register depends upon compliance with the fourth amendment, only Application of U.S. in Matter of Order, Etc. holds that the use of a pen register constitutes a search; indeed, in United States v. John, supra, the court held that it was not necessary to decide that question. In all four of these cases a warrant had in fact been issued, and none of them address the question whether use of the device constitutes a search.

Nor did the Supreme Court decide the question in United States v. New York Telephone Co., supra. It said, 98 S. Ct. at 369: "The Court of Appeals [4] held that pen register surveillance was subject to the requirements of the Fourth Amendment. This conclusion is not challenged by either party, and we find it unnecessary to consider the matter."

In New York Telephone, the government had obtained a court order, which the telephone company resisted, authorizing the installation of a pen register and directing the telephone company to provide facilities and assistance necessary to install it. At issue in the case was not whether a warrant was necessary; one had been obtained.

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4. See Application of U.S. in Matter of Order, Etc., supra.

Rather, the primary issue was whether the District Court had the power to issue an order authorizing pen register surveillance. The Court held that it had such authority under Fed. R. Crim. P. 41(b) which was sufficiently broad to encompass a search, not limited to tangible items but including electronic intrusions, designed to ascertain the use being made of a telephone. The Court did not hold that the fourth amendment required such an order; it merely said that the District Court had the authority to issue the order.

Under Katz, whether pen register surveillance requires compliance with the fourth amendment depends on whether a telephone subscriber has a constitutionally protected expectation that the numbers which he dials will remain private. In determining whether an expectation of privacy is constitutionally justified, we adopted in Venner v. State, 279 Md. 47, 367 A.2d 949 (1977), cert. denied, 431 U.S. 932 (1977), the twofold test articulated by Justice Harlan in his concurring opinion in Katz, i.e., "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361. Other courts have followed this test. See, e.g., United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1); United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1972), cert. denied, 410 U.S. 916 (1973); Smith v. State, 510 P.2d 793 (Alas. 1973), cert. denied, 414 U.S. 1086 (1973); People v. Huddleston, 38 Ill. App. 3d 277, 347 N.E.2d 76 (1976).

It is generally held that the expectation of privacy protected by the fourth amendment attaches to the content of a telephone conversation and not to the fact that a conversation took place. Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254 (9th Cir. 1977); United States v. Clegg, 509 F.2d 605 (5th Cir. 1975); United States v. Baxter, 492 F.2d 150 (9th Cir. 1973), cert. dismissed, 414 U.S. 801 (1973); United States v. Fithian, 452 F.2d 505 (9th Cir. 1971); United States v. Harvey, 394 F. Supp. 228 (E.D. Ark. 1975) aff'd 540 F.2d 1345 (8th Cir. 1976). Clegg dealt with a device in all respects similar to a pen register; it was attached by the telephone company to the defendant's telephone line to determine whether he was illegally circumventing the telephone company's billing system by using a so-called "blue box" device to make long-distance calls. The court there said that the fourth amendment "protects only the content of a telephone conversation and not the fact that a call was placed or that a particular number was dialed." 509 F.2d at 610. This was so, the court said, "because telephone subscribers have no reasonable expectation that records of their calls will not be made . . . [since it is] well known that such records are kept." Id. at 61. Consistent with Clegg, other courts have held that telephone subscribers have no reasonable expectation that records of their calls will not be made. United States v. Harvey, 540 F.2d 1345 (8th Cir. 1976); DiPiazza v. United States, 415 F.2d 99 (6th Cir. 1969), cert. denied, 402 U.S. 949 (1971); United States v. Covello, 410 F.2d 536 (2nd Cir. 1969), cert. denied, 396 U.S. 879 (1969); Nolan v. United States, 423 F.2d 1031 (10th Cir.

, cert. denied, 400 U.S. 848 (1970)
1969); Brandon v. United States, 382 F.2d 607 (10th Cir. 1967); Baxter, supra; Fithian, supra. These cases in the main involve billing records for toll or long-distance phone calls. They seemingly stand for the proposition that, as against the subscriber's claim to privacy, the fourth amendment is not applicable to the seizure of such records in the possession of the telephone company because public awareness that the records are routinely maintained negates any constitutionally protected expectation of privacy regarding them.

In Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254 (9th Cir. 1977), the court held that no substantive fourth amendment right was implicated by the warrantless attachment of a pen register to the telephone line of a subscriber suspected of making local obscene calls. In concluding that no constitutionally protected right of privacy was involved, the court saw little practical difference, insofar as public awareness was concerned, between the maintenance of routine telephone billing records and a pen register. It said:

> "Although a pen register record differs from telephone company billing records, we have no difficulty in now holding that the information recorded is not protected by the Fourth Amendment.
>
> "A pen register record for a particular telephone contains information different from the telephone company billing records for that telephone. Telephone company billing records show only completed calls, not, as with a pen register, the numbers dialed. Furthermore, a pen register record shows the dialing of telephone numbers which, even if completed, would not be shown by billing records, because the numbers are within a local dialing area. It could be argued that since no

> records of such calls are normally maintained, an expectation of privacy exists. This admitted difference is not, in our view, of constitutional dimension and is more than offset by the fact that pen register records are even farther removed than billing records from the content of the communications. Viewed in the round, the information recorded by pen registers is not entitled to Fourth Amendment protection."

"6. The existence of a constitutional right should not depend upon the boundaries established by the telephone company for its local calling areas."
555 F.2d at 256-257.

Judge Hufstedler, in an opinion specially concurring in Hodge, said that the use of the pen register did not constitute a "search" within the meaning of the fourth amendment "because the 'electronic listening' does not encroach upon 'the privacy upon which . . . [one] justifiably relie[s]'" citing Katz. 555 F.2d at 266. After noting that there was no justifiable expectation of privacy in the contents of telephone company billing records, she said:

> "Similarly, there is no expectation of privacy in the contents of a pen register tape. Like billing records, a pen register tape discloses the numbers dialed from a particular telephone and not the contents of any conversation. In fact, a pen register creates a lesser intrusion into a subscriber's privacy because, unlike billing records, a pen register tape does not indicate whether any calls were answered.
>
> "True, the telephone company usually does not keep a record of local telephone calls. But most subscribers are unaware of the boundaries of their local dialing zones, especially in cities where these zones do not coincide with traditional geographic boundaries. Furthermore, it is common practice for the telephone company to keep a record of all calls dialed from a telephone which is subject to a special

> rate structure. . . . Under these circumstances, subscribers do not harbor any justifiable expectation of privacy that a record will not be kept of their outgoing calls. . . . ('. . . For this reason, the acquisition . . . by means of a pen register . . . of nothing more than information concerning . . . the numbers dialed does not offend the Fourth Amendment.')." Id. at 266.

The same conclusion was reached in Note, The Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool, 60 Cornell L. Rev. 1028, 1044-45 (1975). It was there said:

> "[T]he fourth amendment does not bar the use of the pen register. First, even assuming that a privacy expectation is in fact present, it is well settled that toll calls (and their records) are not entitled to a reasonable expectation of privacy. And, with respect to most areas of the country, there seems to be no valid distinction between the expectations associated with local calls on the one hand and those calls that cross the local billing zone on the other hand. The majority of subscribers probably have no real knowledge as to the geographic boundaries of their 'local call' zone."

A second reason for the commentator's conclusion that warrantless pen register surveillance does not violate the fourth amendment was stated as follows:

> "[A]ll telephone subscribers must utilize equipment owned by a third party, the telephone company, in order to place a call. It is therefore unreasonable for a subscriber to assume that the fact of his call passing through the telephone system will remain a total secret from the telephone company. Once this assertion is accepted, it is clear that there can be no reasonable expectation of privacy from law enforcement authorities with respect to the dial pulses detected and recorded by the telephone company. In a variety of analogous contexts, the Supreme Court has determined that a person entitled to receive a communication is similarly entitled to reveal it to government officials without further legal process." Id. at 1045.

Supportive of the conclusion that pen register surveillance does not violate the fourth amendment is United States v. White, 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971), and United States v. Miller, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976). In White, statements made by the defendant were overheard by government agents by means of a hidden transmitter which an informer agreed to wear during his meetings with the defendant. The Court found no constitutionally protected expectation of privacy that the informant would not simultaneously transmit the conversation to the police. In Miller, the Court held that a bank depositor had no legitimate expectation of privacy in the contents of checks and deposit slips turned over to the bank, stating:

> "The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. . . . This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."
> 425 U.S. at 443.

A similar situation exists in the case of telephone calls. While the content of a call is not revealed to the telephone company, the information as to the number dialed must necessarily be revealed, since it is through telephone company switching equipment that calls are completed. As a recipient of such information, the company may reveal it since the caller can have no reasonable expectation that it

will remain private. In fact, the caller should have even less of a justified expectation of privacy, since unlike the disclosures in White and Miller the use of a pen register does not reveal the contents of a communication.

Cases involving other types of surveillance are also relevant. In United States v. Hufford, 539 F.2d 32 (9th Cir.), cert. denied, 429 U.S. 1002 (1976), the court held that the installation of an electronic tracking device on a drum of caffeine to aid government agents in tracking the defendant's truck did not violate the fourth amendment. Citing Katz, the court stated: "[The defendant] did not have a reasonable expectation of privacy as he drove along the public road. While he hoped that his travel would go unmonitored, his movements were knowingly exposed to the public, and therefore are not a subject of fourth amendment protection." 539 F.2d at 33-34. Accord: United States v. Pretzinger, 542 F.2d 517 (9th Cir. 1976). Contra: United States v. Holmes, 521 F.2d 859 (5th Cir. 1975), aff'd xxxxxx by an evenly divided court, en banc 537 F.2d 227 (1976).

The use of mail covers, where postal inspectors copy information contained on the outside of sealed envelopes traveling through the mail, may also be likened to the use of a pen register. In each situation, communications travel through public conveyances; in each the surveillance reveals the destination or point of origin of the communications, but not the content of the message itself. If anything, the use of a mail cover is more of an invasion of privacy than

a pen register since the mail cover reveals the identities of the parties. Nonetheless, courts have generally held that the use of mail covers does not violate the fourth amendment. See Lustiger v. United States, 386 F.2d 132 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968); Canaday v. United States, 354 F.2d 849 (8th Cir. 1966). Post-Katz authority upholding the use of mail covers is limited. See United States v. Leonard, 524 F.2d 1076 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976) (mail cover on international mail); United States v. Balistrieri, 403 F.2d 472 (7th Cir. 1968); United States v. Isaacs, 347 F. Supp. 743 (N.D. Ill. 1972). In United States v. Choate, 422 F. Supp. 261 (C.D. Cal. 1976), the court took a contrary view. While it recognized that a person's expectation of privacy with respect to return addresses on mail is a limited one, the court concluded that a person justifiably expects that the information will be used only for postal purposes and that records of it will not be kept. The court held a person did have a reasonable expectation that his mail would not be used for surveillance purposes. The holding in Choate may be questioned, however, in light of United States v. Miller, supra, where the Supreme Court held that disclosure of information, even on the assumption that it would be used for a limited purpose, negated any expectation of privacy with respect to that information.

We hold that there is no constitutionally protected reasonable expectation of privacy in the numbers dialed into a telephone system and hence no search within the fourth amendment is implicated

by the use of a pen register installed at the central offices of the telephone company. While the guarantees of the fourth amendment are broad, they are not boundless, State v. Siegel, 266 Md. 256, 292 A.2d 86 (1972); not everything a person may want to be private is protected by the Fourth Amendment. As Katz teaches, the fourth amendment does not afford our citizens "a general constitutional right to privacy." In not imposing Title III restrictions on the use of pen registers, it is evident, as New York Telephone explicitly points out, that the Congress did not consider that such devices pose a threat to privacy of the same dimension as the interception of an oral communication. As the Supreme Court noted in that case, pen registers do not reveal whether a communication existed and it recognized that such devices are regularly used by the telephone company without a court order "for the purposes of checking billing operations, detecting fraud, and preventing violations of law." 98 S. Ct. at 373. The intrusion involved in pen register surveillance is minimal; no violation of the integrity of the communication system itself is entailed; and no conversation is overheard.

Whether a telephone subscriber harbors an actual subjective expectation of privacy in the numbers which he dials is, of course, difficult to know. In all probability, he understands that his calls are placed through mechanical equipment and that some record is made. We think it unlikely that the telephone subscriber distinguishes between local or toll calls with respect to an expectation of privacy

in the numbers he dials. Even if he did harbor such an expectation, we are not prepared to say on the record before us that it is one that society would recognize as reasonable and constitutionally protected.

JUDGMENT AFFIRMED;

COSTS TO BE PAID

BY APPELLANT.

IN THE COURT OF APPEALS OF MARYLAND

No. 98

September Term, 1977

MICHAEL LEE SMITH

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Digges
Levine
Eldridge
Orth
Cole,
JJ.

Dissenting Opinion by Eldridge, J.,
in which Digges, J., concurs.

Filed: July 14, 1978

Eldridge, J., dissenting:

Although I recognize that the issue is a close one, I do not share the majority's view that there is no reasonable expectation of privacy in the numbers dialed into a telephone system. Consequently, I disagree with the majority's conclusion that no search within the meaning of the Fourth Amendment is implicated by the police's having a pen register installed to record the numbers dialed from the telephone at the defendant's home.

In *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the Supreme Court held (389 U.S. at 353, emphasis supplied):

> "The Government's activities in electronically listening to and recording the petitioner's words *violated the privacy upon which he justifiably relied while using the telephone booth* and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."

In my opinion, there similarly exists a privacy upon which one justifiably relies with respect to the telephone numbers which he dials in his own home.

Mr. Justice Harlan both joined the majority opinion in *Katz* and further explained the applicable principles in a concurring opinion, stating (389 U.S. at 361):

> "As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.' My understanding of the rule that has emerged

> from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable."

As pointed out in the above quotation, "for most purposes" a person expects privacy in his own home. I know of no sound basis for concluding that there is an exception to this general proposition in regard to telephone numbers which a person dials on his home telephone. It is not like a conversation "in the open." When the average person dials a number in the privacy of his home, he does not contemplate, nor should he reasonably contemplate, that he is exposing the information "to the 'plain view' of outsiders."

The principles set forth by the majority and by Mr. Justice Harlan in *Katz* lead me to the conclusion that the Fourth Amendment does apply when the police have a pen register installed to record the numbers dialed from one's telephone. The same conclusion has been reached by several cases in the United States Courts of Appeal. *Application of United States For Order, Etc.*, 546 F.2d 243, 245 (8th Cir. 1976), *cert. denied, Southwestern Bell Telephone Company v. United States,* U.S. , 98 S.Ct. 716, 54 L.Ed.2d 750 (1978); *Application of U. S. In Matter of Order, Etc.*, 538 F.2d 956, 959 (2d Cir. 1976), *reversed on other grounds, United States v. New York Tel. Co.*, 434 U.S. 149, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977); *United States v. Illinois Bell Tel. Co.*, 531 F.2d 809, 813 (7th Cir. 1976); *United States v. John*, 508 F.2d 1134, 1141 (8th Cir. 1975),

cert. denied, 421 U.S. 962, 95 S.Ct. 1948, 44 L.Ed.2d 448 (1975); *United States v. Falcone*, 505 F.2d 478, 482 n. 21 (3d Cir. 1974), *cert. denied*, 420 U.S. 955, 95 S.Ct. 1339, 43 L.Ed.2d 432 (1975).

The principal basis for the view that the use of a pen register does not constitute a search for purposes of the Fourth Amendment seems to be the conclusion of some judges that there is no justifiable expectation of privacy with respect to numbers dialed because "[t]elephone subscribers are fully aware that records will be made of their toll calls." *United States v. Baxter*, 492 F.2d 150, 167 (9th Cir. 1973), *cert. denied*, 416 U.S. 940, 94 S.Ct. 1945, 40 L.Ed.2d 292 (1974). *See also Hodge v. Mountain States Tel. & Tel. Co.*, 555 F.2d 254, 256, 266 (9th Cir. 1977); *United States v. Clegg*, 509 F.2d 605, 610 (5th Cir. 1975). This theory is relied on by the majority in the instant case.

However, the mere fact that a person who thinks about it would realize that the numbers dialed in *completed* long distance calls would have to be recorded for billing purposes, does not, in my judgment, warrant the conclusion that no reasonable expectation of privacy exists generally with respect to telephone numbers dialed. Such calls represent only a small percentage of those made by the average individual. The overwhelming majority of calls made by the average person are local and do not involve toll charges. Moreover, as to calls outside of one's local area, many are not answered or result in busy signals. Nevertheless, the pen register records even these. Because one's expectation of privacy in a particular type of

situation may not be fully realized in a minority of instances does not necessarily make that expectation unreasonable.

The majority's attempted analogy between *United States Miller*, 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976), and the situation in the instant case is unpersuasive. In *Miller*, with regard to checks and deposit slips, the Supreme Court observed that the "depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government." But it was not the telephone company which instigated the installation of the pen register in the instant case. *Miller* is thus distinguishable by the fact that here, absent the government's intrusion, the telephone company *could* not have revealed any information to the government regarding Smith's calls. Normally the telephone company does not, in any meaningful sense, possess information about local telephone calls which it could pass on. The mere fact that machines (switching equipment) owned by the telephone company responded in certain ways to the defendant's dialing numbers cannot reasonably be construed as a transfer of information by the defendant to the telephone company. There is no indication in this case that the telephone company's machinery preserved a record of the numbers dialed, nor that any telephone company employee did or could xxxxxxx be expected to observe the process. The defendant, by the simple act of dialing local numbers, did not reasonably intend to reveal information; he merely made use of machinery in particular ways

which, without the police intrusion, would have remained fully private.

In sum, I agree with the position suggested by Mr. Justice Powell, dissenting in part in *United States v. Giordano*, 416 U.S. 505, 548, 553-554, 94 S.Ct. 1820, 1842, 1845, 40 L.Ed.2d 341 (1974), that the permissibility of law enforcement officials using a pen register depends upon compliance with the requirements of the Fourth Amendment.

Judge Digges has authorized me to state that he concurs with the views expressed herein.

Supreme Court, U. S.
FILED
JAN 24 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5374

MICHAEL LEE SMITH,

Petitioner,

—*v.*—

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1978
CERTIORARI GRANTED DECEMBER 4, 1978

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5374

MICHAEL LEE SMITH,

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—*v.*—

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Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

INDEX

IN THE CRIMINAL COURT OF BALTIMORE

STATE OF MARYLAND

vs.

MICHAEL LEE SMITH

DOCKET ENTRIES

April 2, 1976—Application for bail reduction Order of Court setting Bail at $15,000.00

April 6, 1976—Indictment filed (Robbery, etc.) Number: 57609713

April 8, 1976—Copy of Request for further information filed

April 9, 1976—Recognizance—Allegheny Mutual Cas Co.—$15,000.00 total

April 26, 1976—Appearance of Howard L. Cardin filed

April 30, 1976—Arraignment removed. Atty. appearance filed Arabian, J.

May 27, 1976—Insanity plea filed

June 21, 1976—Arraignment post-poned reset 7/12/76. Arabian, J.

July 14, 1976—Removed from docket—Location: Bail

July 28, 1976—Insanity plea withdrawn—set for trial, Bundy, J. Location: Bail

October 20, 1976—Medical Report filed

November 3, 1976—Motion for Discovery filed

November 8, 1976—Motion to dismiss heard & denied, Murphy, J.

November 8, 1976—Motion to suppress evidence withdrawn by defendant.

Arr. & submits under plea: Not guilty, statement of facts before Murphy, J.

November 8, 1976—Verdict: Guilty-1st count, stricken & held Sub-curia

November 29, 1976—Probation Report filed

March 9, 1977—Verdict: Guilty—1st count

March 9, 1977—Judgment: Six (6) years c/o C of C from 2/9/77 and to go to Patuxent Institution for examination and report. Murphy, J.

March 9, 1977—Accept bail in the amount of $25,000 in the event of an appeal to the court of special appeals. Murphy, J.

March 9, 1977—Commitment & Order filed

March 9, 1977—Medical report of 12/7/76 filed

March 10, 1977—Appeal to the Court of Special Appeals filed. To be transmitted by: 5/9/77

March 10, 1977—Appearance of Howard L. Cardin Counsel for Appellant.

March 10, 1977—Recognizance taken: Allegheny Mutual Cas. Co. $20,700. and Property Bail
3404 Esther Place $4300.00—$25,000. Total

May 24, 1977—Extension of time to file transcript w/clerk on 30 May 1977, and to transmit record by 6 June 1977, Morton, J.

June 03, 1977—Transcript of Testimony filed and Record transmitted to the Court of Special Appeals.

* * *

IN THE CRIMINAL COURT OF BALTIMORE CITY

EXCERPTS FROM TRANSCRIPT OF HEARING,

November 8, 1976

DEFINITION OF ISSUE BY TRIAL COUNSEL

[60-61] MR. CARDIN: Our argument is that it [pen register] comes under any other type of search and seizure, that that's what it is, and that's exactly what the Court in *Giordano* said. We're not trying to say it's excluded because it's in conflict with Title 3 or with Article 27, Section 125 or 10-402. We are saying it is in conflict with search and seizure law as we know it because it is a search and seizure, we submit, and therefore it does require prior court authorization before there can be invasion of that particular privacy. If it fell under either 125 or Title 3, then the State in order to attach a pen register would have to show that no other investigative techniques are available and the Court has already said—The Supreme Court of the United States has already said even if there are hundreds of other investigative techniques available, a pen register can also be used, but it needs still the prior court authority, at least. That's our argument.

* * * *

RULING OF THE TRIAL COURT

[62-63] THE COURT: Mr. Cardin, I have read the cases and on your motion to dismiss it will be denied. That's the one that addresses itself to the pen register. I am not of the opinion that the pen register device is a violation of the Fourth Amendment . . .

* * * *

MICHAEL LEE SMITH

v.

STATE OF MARYLAND

[No. 98, September Term, 1977]

Decided July 14, 1978

CRIMINAL LAW—*Electronic Recording Devices—Maryland Wire Tapping Act—Consent To Recording Telephone Conversation Need Not Be Given By All Participants—Attachment Of Recording Device To Victim's Telephone Without Court Order Does Not Constitute Illegal Interception Of Telephonic Communication Under Code (1974) Courts Article § 10-402.* Where victim of threatening and obscene phone calls, tape recorded such conversations without knowledge of caller or the police, the Court *held* that such interception and recording of the conversations did not violate § 10-402 of the Maryland Wire Tapping Act. Code (1974) Courts Article §§ 10-401 through 10-408.

pp. 160-162

CRIMINAL LAW—*Electronic Recording Devices—Recording Telephone Conversation Without Knowledge And Consent Of All Participants Violates Criminal Statute—Code (1957, 1976 Repl. Vol.) Art. 27, § 125A.*

pp. 160-162

CRIMINAL LAW—*Electronic Recording Devices—Maryland Wire Tapping Act—Use Of Pen Register To Record Telephone Numbers Dialed Is Not An Interception Of Telephonic Communication—Use Of Pen Register Does Not Violate Maryland Wire Tapping Act—Code (1974) Courts Article § 10-402(a).* Where telephone company, at request of police, installed a pen register at central office to record phone numbers of outgoing calls made from defendant's telephone, the Court *held* that the use of a pen register did not violate the Maryland Wire Tapping Act and that evidence obtained from use of the pen register was properly admitted at defendant's trial. Code (1974) Courts Article § 10-402(a).

pp. 162-164

CONSTITUTIONAL LAW—*Electronic Recording Devices—Searches And Seizures—There Is No Constitutionally Protected Expectation Of Privacy In Numbers Dialed Into A Telephone System—Use Of Pen Register To Record Numbers Dialed Does Not Involve Search Or Seizure Within Fourth Amendment.* Where telephone company, at request of police, installed a pen register at central office to record phone numbers of outgoing calls made from defendant's telephone, the Court *held* that the use of a pen register did not violate the search and seizure protection of the Fourth Amendment of the U.S. Constitution, and that information obtained from use of the pen register and the fruits thereof properly were admitted at defendant's trial.

pp. 164-174

J.A.A.

Appeal from the Criminal Court of Baltimore (MURPHY, J.), pursuant to certiorari to the Court of Special Appeals.

Michael Lee Smith was found guilty of robbery and sentenced to ten years' imprisonment. From that conviction and sentence, Smith appealed to the Court of Special Appeals. Certiorari was granted prior to consideration by that court to review whether electronically obtained evidence was improperly admitted at Smith's criminal trial.

Judgment affirmed. Costs to be paid by appellant.

The cause was argued before MURPHY, C. J., and SMITH, DIGGES, LEVINE, ELDRIDGE and ORTH, JJ., and reargued before MURPHY, C. J., and SMITH, DIGGES, LEVINE, ELDRIDGE, ORTH and COLE, JJ.

Howard L. Cardin for appellant.

Stephen B. Caplis, Assistant Attorney General, with whom were *Francis B. Burch, Attorney General, William A. Swisher, State's Attorney for Baltimore City,* and *Mary Ann Willen, Assistant State's Attorney for Baltimore City,* on the brief, for appellee.

MURPHY, C. J., delivered the opinion of the Court. DIGGES, ELDRIDGE and COLE, JJ., dissent. ELDRIDGE, J.,

filed a dissenting opinion in which DIGGES, J., concurs at page 174 *infra*. COLE, J., filed a dissenting opinion at page 178 *infra*.

Whether electronically obtained evidence was improperly admitted at the appellant Smith's criminal trial in violation of state law and the federal constitution is the central issue in this case.

Smith was charged with having robbed Patricia McDonough on March 5, 1976. Evidence adduced at the trial showed that the victim was returning to her home shoftly after midnight on the morning of the crime when she observed a man in her neighborhood changing a tire on a 1975 Monte Carlo automobile which had a dark green bottom and a tan top. As Miss McDonough approached her home, she was suddenly grabbed from behind and her pocketbook forcibly taken from her. In the course of the robbery, the victim had a full-face view of the robber and promptly gave Officer Kenneth Lucas a description of her assailant and of the 1975 Monte Carlo automobile.

Shortly after the crime was committed, Miss McDonough received a threatening and obscene telephone call from an individual who identified himself as the person who had robbed her. She thereafter received a series of such calls from the robber and so advised the police. Unknown to the police, a friend of Miss McDonough, Walt Heline, had attached a recording device to her telephone and instructed her how to tape the robber's conversation when he called. After Miss McDonough taped three or four calls from her assailant, she informed the police that she had recorded the conversations, and eventually gave the tapes to them.

In the meantime, on March 13, at the request of the police, the telephone company, at its central office, installed terminating accounting equipment on the victim's telephone line in an effort to determine the origin of the calls she was receiving from the robber. As a result, it was ascertained that some of the calls were being made from pay phones in the immediate vicinity of the victim's home. Earlier, the victim had advised

the police that she thought one of the calls had been made from a telephone at a private residence.

On March 15, Miss McDonough received a call from the robber requesting that she step out on her porch so that he could see her. She did so and observed the 1975 Monte Carlo which she had earlier described to the police, driving slowly by her home.

Officer Lucas, to whom the victim had originally reported the crime, was on the lookout for a man fitting the description of the robber and of the described vehicle. On March 16, in the general vicinity of the victim's home, the appellant Smith stopped Lucas and sought his assistance in opening the locked door of his 1975 Monte Carlo. Lucas took the license number of the vehicle, learned that it was registered to the appellant Smith, and so notified other investigating police officers.

On March 17, the telephone company, at the request of the police, installed a pen register [1] at its central offices to record the phone numbers of calls made from the telephone at Smith's residence. On March 17, a call was made from Smith's residence to the victim's home. The police thereafter obtained a search warrant to search Smith's automobile and residence. The search of the residence revealed that a page in Smith's telephone book was turned down; it contained the name and number of the victim. On March 19, the victim viewed a six-man line-up at police headquarters and identified the appellant Smith as the man who robbed her.

In pretrial motions, Smith had sought to suppress the evidence obtained by the tape recordings and the pen register; he also moved to suppress the line-up identifica-

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[1] A pen register was well described by Justice Powell in United States v. Giordano, 416 U.S. 505, 94 S. Ct. 1820, 40 L.Ed.2d 341 (1974), as follows:

> "A pen register is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations. . . ." 416 U.S. at 549.

tion. He contended that the attachment of the recording device to the victim's telephone without a court order violated Maryland Code (1957, 1976 Repl. Vol.) Art. 27, § 125A(a); under that section, it is a misdemeanor "for any person in this State to use any electronic device . . . to overhear or record any part of the conversation or words spoken to or by any person in private conversation without the knowledge or consent . . . of that other person." He also contended that the recording device attached to the victim's phone violated Code (1974), § 10-402 of the Courts and Judicial Proceedings Article; that section prohibits a person from obtaining "the whole or any part of a telephonic . . . communication to which the person is not a participant by means of a device . . . unless consent is given by the participants." Appellant further contended that the evidence resulting from the installation of the pen register should be suppressed because its obtention was based on information gleaned from the unlawful tape recordings of the telephone conversations. He also argued that the pen register constituted an unlawful "interception" of a telephonic communication forbidden by § 10-402 of the Courts Article. He furthermore maintained that, absent a court order or search warrant, the use of the pen register constituted an illegal search and seizure in contravention of the fourth amendment to the federal constitution. Finally, Smith argued that without the illegally obtained electronic evidence he would not have been arrested, required to appear in a line-up and identified by the victim. He therefore claimed that the line-up identification should also be suppressed, but he withdrew this contention before the trial judge acted on his motions.

The trial judge overruled the motions to suppress, and the electronically obtained evidence was admitted. Smith was found guilty of robbery and sentenced to ten years in prison. We granted certiorari prior to decision by the Court of Special Appeals to review the important issues raised in the case.

(1)

The Tape Recorded Telephone Conversations

At the trial, the State conceded that the recording of the telephone conversations violated § 125A of Art. 27. It maintained that the tape recordings were nevertheless admissible in evidence because the only sanction prescribed by the statute was criminal prosecution of those who violate its provisions. The Court of Special Appeals so held in *Reed* v. *State*, 35 Md. App. 472, 372 A. 2d 243 (1977), and *Pennington* v. *State*, 19 Md. App. 253, 310 A. 2d 817 (1973), *cert. denied*, 271 Md. 742, *cert. denied*, 419 U.S. 1019 (1974). The appellant does not challenge that interpretation of the statute, and we therefore have no occasion to consider the question in this case.

Appellant claims instead that the attachment to the victim's phone of the recording device without a court order constituted an illegal "interception" of a telephonic communication contravention of § 10-402 of the Courts Article.

Until its repeal by ch. 692 of the Acts of 1977,[2] § 10-402 was part of the Maryland Wire Tapping Act, §§ 10-401 through 10-408 of the Courts Article, in effect at the time of the appellant's arrest and prosecution. That Act declared in § 10-401 that the right of the people to be secure against "unreasonable interception of telephonic . . . communications may not be violated." It expressed the legislative mandate that the "interception and divulgence of a private communication by any person not a party thereto is contrary to the public policy of

[2] Chapter 692 repealed the Maryland Wire Tapping Act and Art. 27, § 125A; in its place it enacted a new statute comprehensively regulating the interception of wire and oral communications. The new statute became effective on July 1, 1977 and is codified as Maryland Code (1974, 1977 Cum. Supp.) §§ 10-401 through 10-412. The Act closely parallels Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. Both the state and federal statutes make it unlawful, with certain exceptions, to intercept "any wire or oral communication," as those terms are therein defined, and each contains a provision making all evidence obtained in violation of the statute inadmissible in court.

the state, and may not be permitted except by court order in unusual circumstances to protect the people." Section 10-402(a) makes it unlawful, absent a court order, for any person to obtain a telephonic communication to which he is not a participant by means of any device unless consent is given by the participants. Section 10-406 provides that evidence obtained in violation of the Maryland Wire Tapping Act is inadmissible in court.

The appellant relies on *Robert* v. *State*, 220 Md. 159, 151 A. 2d 737 (1959), as authority for the exclusion of the tape recordings under § 10-402(a). In *Robert*, police officers, anticipating that the defendant would make a phone call to certain friends in a motel, positioned themselves at the motel's telephone switchboard. When the expected call came through the switchboard, the officers monitored it by means of a headset connected through a press key to the switchboard. After observing that the officers could not be classified as participants in the conversation, and that they overheard it without the consent of all of the participants, our predecessors held that the headset was an electrical device by which the officers obtained the telephone conversation in contravention of the Act's provisions, rendering the evidence thereby obtained inadmissible in court.

Robert is plainly inapposite on its facts. There, the police officers were not participants in the conversation. In the present case, Miss McDonough was a participant in the conversations which she recorded. There is no requirement in § 10-402(a) that consent to the recording must be given by all participants in the conversation. Consequently, there was no violation of § 10-402(a), although plainly the recording of the conversations violated Art. 27, § 125A. *Cf. Clark* v. *State*, 2 Md. App. 756, 237 A. 2d 768 (1968), *cert. denied*, 394 U.S. 1001 (1969).

Appellant's suggestion that it was Heline and not the victim who recorded the conversations is not supported by the record. Nor is there any evidence to support Smith's claim that in attaching the recording device to the victim's phone Heline acted as a police agent. Simply

because the police learned, after the fact, that the device had been attached to the victim's phone, but did not require its removal, does not warrant a finding that § 10-402(a) was violated. Finally, there is no justification for Smith's reliance on *Commonwealth* v. *McCoy*, 442 Pa. 234, 275 A. 2d 28 (1971), and *Cameron* v. *State*, 365 P. 2d 576 (Okla. 1961), to establish that § 10-402(a) was violated by the recording of the conversations; the statutes involved in those cases were markedly different from § 10-402(a) and therefore are not applicable in this case.

(2)

The Pen Register

We find no merit in the argument that the installation of the pen register at the central offices of the telephone company to record the phone numbers of outgoing calls made from Smith's residence telephone constituted the "interception" of a telephonic communication in violation of § 10-402(a).

The Supreme Court held in *United States* v. *New York Telephone Co.*, —— U.S. ——, 98 S. Ct. 364, 54 L.Ed.2d 376 (1977), that a pen register is not encompassed within the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. That Act, which comprehensively regulates wiretapping and electronic surveillance, requires a court order authorizing or approving the interception of a wire or oral communication. The term "intercept" is defined in § 2510(4) of the statute to mean "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." The Supreme Court said that pen registers are not within the statute because they are not devices used to intercept oral or wire communications, *i.e.*, they do not "intercept" because they do not acquire the "contents" of a communication, as that latter term is defined in § 2510(8). The Court said:

> "Indeed, a law enforcement official could not even determine from the use of a pen register whether a communication existed. These devices do not hear sound. They disclose only the telephone numbers that have been dialed—a means of establishing communication. Neither the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed are disclosed by pen registers. Furthermore, pen registers do not accomplish the 'aural acquisition' of anything. They decode outgoing telephone numbers by responding to changes in electrical voltage caused by the turning of the telephone dial (or the pressing of buttons on push button telephones) and present the information in a form to be interpreted by sight rather than by hearing." 98 S. Ct. at 369-70.

Although the verbiage of § 10-402(a) differs from the federal statute, the prohibitions underlying each law require the "interception" of a communication. We conclude, as did the Supreme Court in *New York Telephone*, and most federal courts which have considered the question,[3] that a pen register is not a device which "intercepts" a telephonic communication. Accordingly, the use of the pen register did not violate § 10-402(a).

Since the evidence procured by recording the telephone conversations which the victim had with her assailant was properly admitted at the trial, Smith's alternative argument that the pen register evidence must be suppressed as an illegal derivative use of the recorded telephone conversations is also lacking in merit. *Cf. Everhart* v. *State*, 274 Md. 459, 337 A. 2d 100 (1975); *Carter* v. *State*, 274 Md. 411, 337 A. 2d 415 (1975).

Appellant next contends that pen register surveillance constitutes a search subject to the warrant requirements of the fourth amendment. Since no warrant or court order was obtained authorizing the installation of the

[3] *See, e.g.*, United States v. Illinois Bell Tel. Co., 531 F.2d 809 (7th Cir. 1976); United States v. Southwestern Bell Telephone Co., 546 F.2d 243 (8th Cir. 1976); United States v. Falcone, 505 F.2d 478 (3rd Cir. 1974), *cert. denied*, 420 U.S. 955 (1975).

pen register, Smith claims that the evidence which the pen register produced, and all evidence derived from its use, must be suppressed. The State, on the other hand, contends that the better-reasoned cases support the view that pen register surveillance is not a search within the fourth amendment and that a warrant is not required to install such a device. Substantial authority exists for each position.

In *Katz* v. *United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967), the Supreme Court held that evidence obtained without a warrant by government agents of words spoken by the defendant in a telephone conversation, which the agents overheard by attaching an electronic listening device to the outside of a public telephone booth from which the defendant had placed a telephone call, violated the fourth amendment. It held, overrling *Olmstead* v. *United States*, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928), that the fourth amendment governs not only the seizure of tangible items, but also the recording of oral statements overheard, even in the absence of a technical trespass against local property law. It said that the fourth amendment protects people, and not merely places, against unreasonable searches and seizures; that it protects "individual privacy against certain kinds of governmental intrusion"; that what a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection; but that what he seeks to preserve as private may be constitutionally protected. The Court said that while the fourth amendment cannot be translated into a general constitutional right to privacy, the activities of the government agents violated "the privacy upon which [the defendant] justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." 389 U.S. at 353.

The admissibility of evidence obtained by use of a pen register was considered in *United States* v. *Giordano*, 416 U.S. 505, 94 S. Ct. 1820, 40 L.Ed.2d 341 (1974). There, court orders had been issued authorizing interception of wire communications and the installation of a

pen register, and these orders were subsequently extended. The application to extend the pen register detailed the contents of conversations intercepted pursuant to the wire interception orders. The Court held that the wire interception orders were invalid since they had not been authorized in conformity with the controlling federal statute. It further held that evidence gathered under the pen register extension order was inadmissible because tainted by the use of the unlawfully intercepted wire communications to secure judicial approval to extend the pen register surveillance order. The Court did not hold that use of a pen register requires compliance with the warrant requirements of the fourth amendment, although that result might be implied in view of the decision to exclude the evidence which the pen register produced.

In a concurring and dissenting opinion by Justice Powell, in which the Chief Justice and Justices Blackmun and Rehnquist joined, it was pointed out that there was no dispute that the pen register order was based on probable cause and lawful under the fourth amendment. In this context, Justice Powell stated: "Because a pen register device is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment." 416 U.S. at 553-554. That Justice Powell would not have decided the constitutional issue is, however, clear from his further statement, appearing at footnote 4, 416 U.S. at 554: "The Government suggests that the use of a pen register may not constitute a search within the meaning of the Fourth Amendment. I need not address this question, for in my view the constitutional guarantee, assuming its applicability, was satisfied in this case." Justice Powell concluded that the pen register extension order was valid, because based only in part on the unlawfully intercepted wire communications, and that the evidence gathered by the device was admissible.

Relying on Justice Powell's statement to support the proposition that the use of a pen register depends on compliance with the requirements of the fourth amend-

ment, the court in *Application of U.S. in Matter of Order, Etc.*, 538 F. 2d 956 (2nd Cir. 1976), stated at 959: "We take this statement to mean that a pen register order involves a search and seizure under the Fourth Amendment, and that a court may issue such an order only upon a showing of probable cause." A number of other courts have reiterated justice Powell's statement concerning pen registers and compliance with the fourth amendment. *See United States* v. *Illinois Bell Tel. Co.*, 531 F. 2d 809 (7th Cir. 1976); *United States* v. *Doolittle*, 507 F. 2d 1368 (5th Cir.), *cert. dismissed*, 423 U.S. 1008 (1975); *United States* v. *John*, 508 F. 2d 1134 (8th Cir.), *cert. denied*, 421 U.S. 962 (1975); *United States* v. *Brick*, 502 F. 2d 219 (8th Cir. 1974). Although each of these cases states that the propriety of the use of a pen register depends upon compliance with the fourth amendment, only *Application of U.S. in Matter of Order, Etc.* holds that the use of a pen register constitutes a search; indeed, in *United States* v. *John*, *supra*, the court held that it was not necessary to decide that question. On all four of these cases a warrant had in fact been issued, and none of them address the question whether use of the device constitutes a search.

Nor did the Supreme Court decide the question in *United States* v. *New York Telephone Co.*, *supra*. It said, 98 S. Ct. at 369: "The Court of Appeals[4] held that pen register surveillance was subject to the requirements of the Fourth Amendment. This conclusion is not challenged by either party, and we find it unnecessary to consider the matter."

In *New York Telephone*, the government had obtained a court order, which the telephone company resisted, authorizing the installation of a pen register and directing the telephone company to provide facilities and assistance necessary to install it. At issue in the case was not whether a warrant was necessary; one had been obtained. Rather, the primary issue was whether the District Court had the power to issue an order authoriz-

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[4] *See* Application of U.S. in Matter of Order, Etc., *supra*.

ing pen register surveillance. The Court held that it had such authority under Fed. R. Crim. P. 41(b) which was sufficiently broad to encompass a search, not limited to tangible items but including electronic intrusions, designed to ascertain the use being made of a telephone. The Court did not hold that the fourth amendment required such an order; it merely said that the District Court had the authority to issue the order.

Under *Katz*, whether pen register surveillance requires compliance with the fourth amendment depends on whether a telephone subscriber has a constitutionally protected expectation that the numbers which he dials will remain private. In determining whether an expectation of privacy is constitutionally justified, we adopted in *Venner* v. *State*, 279 Md. 47, 367 A. 2d 949 (1977), *cert. denied*, 431 U.S. 932 (1977), the twofold test articulated by Justice Harlan in his concurring opinion in *Katz*, *i.e.*, "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361. Other courts have followed this test. *See, e.g.*, *United States* v. *Peterson*, 524 F. 2d 167 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976); *United States* v. *Hitchcock*, 467 F. 2d 1107 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); *Smith* v. *State*, 510 P. 2d 793 (Alas.), *cert. denied*, 414 U.S. 1086 (1973); *People* v. *Huddleston*, 38 Ill. App. 3d 277, 347 N.E.2d 76 (1976).

It is generally held that the expectation of privacy protected by the fourth amendment attaches to the content of a telephone conversation and not to the fact that a conversation took place. *Hodge* v. *Mountain States Tel. & Tel. Co.*, 555 F. 2d 254 (9th Cir. 7977); *United States* v. *Clegg*, 509 F. 2d 605 (5th Cir. 1975); *United States* v. *Baxter*, 492 F. 2d 150 (9th Cir.), *cert. dismissed*, 414 U.S. 801 (1973); *United States* v. *Fithian*, 452 F. 2d 505 (9th Cir. 1971); *United States* v. *Harvey*, 394 F. Supp. 228 (E.D. Ark. 1975) *aff'd* 540 F. 2d 1345 (8th Cir. 1976). *Clegg* dealt with a device in all respects similar to a pen register; it was attached by the telephone company to the defendants' telephone line to determine whether

h was illgally circumventing the telephone company's billing systm by using a so-called "blue box" device to make long-distance calls. The court there said that the fourth amendment "protects only the content of a telephone conversation and not the fact that a call was placed or that a particular number was dialed." 509 F. 2d at 610. This was so, the court said, "because telephone subscribers have no reasonable expectation that records of their calls will not be made . . . [since it is] well known that such records are kept." *Id.* at 610. Consistent with *Clegg*, other courts have held that telephone subscribers have no reasonable expectation that records of their calls will not be made. *United States* v. *Harvey*, 540 F. 2d 1345 (8th Cir. 1976); *DiPiazza* v. *United States*, 415 F. 2d 99 (6th Cir. 1969), *cert. denied*, 402 U.S. 949 (1971); *United States* v. *Covello*, 410 F. 2d 536 (2nd Cir.), *cert. denied*, 396 U.S. 879 (1969); *Nolan* v. *United States*, 423 F. 2d 1031 (10th Cir. 1969), *cert. denied*, 400 U.S. 848 (1970); *Brandon* v. *United States*, 382 F. 2d 607 (10th Cir. 1967); *Baxter, supra; Fithian, supra.* These cases in the main involve billing records for toll or long-distance phone calls. They seemingly stand for the proposition that, as against the subscriber's claim to privacy, the fourth amendment is not applicable to the seizure of such records in the possession of the telephone company because public awareness that the records are routinely maintained negates any constitutionally protected expectation of privacy regarding them.

In *Hodge* v. *Mountain States Tel. & Tel. Co.*, 555 F. 2d 254 (9th Cir. 1977), the court held that no substantive fourth amendment right was implicated by the warrantless attachment of a pen register to the telephone line of a subscriber suspected of making local obscene calls. In concluding that no constitutionally protected right of privacy was involved, the court saw little practical difference, insofar as public awareness was concerned, between the maintenance of routine telephone billing records and a pen register. It said:

> "Although a pen register record differs from telephone company billing records, we have no difficulty

in now holding that the information recorded is not protected by the Fourth Amendment.

"A pen register record for a particular telephone contains information different from the telephone company billing records for that telephone. Telephone company billing records show only completed calls, not, as with a pen register, the numbers dialed. Furthermore, a pen register record shows the dialing of telephone numbers which, even if completed, would not be shown by billing records, because the numbers are within a local dialing area. It could be argued that since no records of such calls are normally maintained, an expectation of privacy exists. This admitted difference is not, in our view, of constitutional dimension[6] and is more than offset by the fact that pen register recorsd are even farther removed than billing records from the content of the communications. Viewed in the round, the information recorded by pen registers is not entitled to Fourth Amendment protection."

"[6] The existence of a constitutional right should not depend upon the boundaries established by the telephone company for its local calling areas." 555 F.2d at 256-257.

Judge Hufstedler, in an opinion specially concurring in *Hodge*, said that the use of the pen register did not constitute a "search" within the meaning of the fourth amendment "because the 'electronic listening' does not encroach upon 'the privacy upon which . . . [one] justifiably relie[s]'" citing *Katz*. 555 F. 2d at 266. After noting that there was no justifiable expectation of privacy in the contents of telephone company billing records, she said:

> "Similarly, there is no expectation of privacy in the contents of a pen register tape. Like billing records, a pen register tape discloses the numbers dialed from a particular telephone and not the contents of any conversation. In fact, a pen register creates a lesser intrusion into a subscriber's privacy because, unlike

> billing records, a pen register tape does not indicate whether any calls were answered.
>
> "True, the telephone company unusually does not keep a record of local telephone calls. But most subscribers are unaware of the boundaries of their local dialing zones, especially in cities where these zones do not coincide with traditional geographic boundaries. Furthermore, it is common practice for the telephone company to keep a record of all calls dialed from a telephone which is subject to a special rate structure. . . . Under these circumstances, subscribers do not harbor any justifiable expectation of privacy that a record will not be kept of their outgoing calls. . . . ('. . . For this reason, the acquisition . . . by means of a pen register . . . of nothing more than information concerning . . . the numbers dialed does not offend the Fourth Amendment.')." *Id.* at 266.

The same conclusion was reached in Note, *The Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool*, 60 Conrnell L. Rev. 1028, 1044-45 (1975). It was there said:

> "[T]he fourth amendment does not bar the use of the pen register. First, even assuming that a privacy expectation is in fact present, it is well settled that toll calls (and their records) are not entitled to a reasonable expectation of privacy. And, with respect to most areas of the country, there seems to be no valid distinction between the expectations associated with local calls on the one hand and those calls that cross the local billing zone on the other hand. The majority of subscribers probably have no real knowledge as to the geographic boundaries of their 'local call' zone."

A second reason for the commentator's conclusion that warrantless pen register surveillance does not violate the fourth amendment was stated as follows:

> "[A]ll telephone subscribers must utilize equipment owned by a third party, the telephone company, in

order to place a call. It is therefore unreasonable for a subscriber to assume that the fact of his call passing through the telephone system will remain a total secret from the telephone company. Once this assertion is accepted, it is clear that there can be no reasonable expectation of privacy from law enforcement authorities with respect to the dial pulses detected and recorded by the telephone company. In a variety of analogous contexts, the Supreme Court has determined that a person entitled to receive a communication is similarly entitled to reveal it to government officials without further legal process." *Id.* at 1045.

Supportive of the conclusion that pen register surveillance does not violate the fourth amendment is *United States* v. *White*, 401 U.S. 745, 91 S. Ct. 1122, 28 L.Ed.2d 453 (1971), and *United States* v. *Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L.Ed.2d 71 (1976). In *White*, statements made by the defendant were overheard by government agents by means of a hidden transmitter which an informer agreed to wear during his meetings with the defendant. The Court found no constitutionally protected expectation of privacy that the informant would not simultaneously transmit the conversation to the police. In *Miller*, the Court held that a bank depositor had no legitimate expectation of privacy in the contents of checks and deposit slips turned over to the bank, stating:

> "The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government. . . . This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." 425 U.S. at 443.

A similar situation exists in the case of telephone calls. While the content of a call is not revealed to the telephone company, the information as to the number dialed must necessarily be revealed, since it is through telephone company switching equipment that calls are completed. As a recipient of such information, the company may reveal it since the caller can have no reasonable expectation that it will remain private. In fact, the caller should have even less of a justified expectation of privacy, since unlike the disclosures in *White* and *Miller* the use of a pen register does not reveal the contents of a communciation.

Cases involving other types of surveillance are also relevant. In *United States* v. *Hufford*, 539 F.2d 32 (9th Cir.), *cert. denied*, 429 U.S. 1002 (1976), the court held that the installation of an electronic tracking device on a drum of caffeine to aid government agents in tracking the defendant's truck did not violate the fourth amendment. Citing *Katz*, the court stated: "[The defendant] did not have a reasonable expectation of privacy as he drove along the public road. While he hoped that his travel would go unmonitored, his movements were knowingly exposed to the public, and therefore are not a subject of fourth amendment protection." 539 F. 2d at 33-34. *Accord: United States* v. *Pretzinger*, 542 F. 2d 517 (9th Cir. 1976). *Contra: United States* v. *Holmes*, 521 F. 2d 859 (5th Cir. 1975), *aff'd by an evenly divided court*, en banc 537 F. 2d 227 (1976).

The use of mail covers, where postal inspectors copy information contained on the outside of sealed envelopes traveling through the mail, may also be likened to the use of a pen register. In each situation, communications travel through public conveyances; in each the surveillance reveals the destination or point of origin of the communications, but not the content of the message itself. If anything, the use of a mail cover is more of an invasion of privacy than a pen register since the mail cover reveals the identities of the parties. Nonetheless, courts have generally held that the use of mail covers does not violate the fourth amendment. *See Lustiger* v. *United States*, 386 F. 2d 132 (9th Cir. 1967), *cert.*

denied, 390 U.S. 951 (1968); *Canaday* v. *United States* 354 F. 2d 849 (8th Cir. 1966). Post-*Katz* authority upholding the use of mail covers is limited. *See United States* v. *Leonard*, 524 F. 2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976) (mail cover on international mail); *United States* v. *Balistrieri*, 403 F. 2d 472 (7th Cir. 1968); *United States* v. *Isaacs*, 347 F. Supp. 743 (N.D. Ill. 1972). In *United States* v. *Choate*, 422 F. Supp. 261 (C.D. Cal. 1976), the court took a contrary view. While it recognized that a person's expectation of privacy with respect to return addresses on mail is a limited one, the court concluded that a person justifiably expects that the information will be used only for postal purposes and that records of it will not be kept. The court held a person did have a reasonable expectation that his mail would not be used for surveillance purposes. The holding in *Choate* may be questioned, however, in light of *United States* v. *Miller*, *supra*, where the Supreme Court held that disclosure of information, even on the assumption that it would be used for a limited purpose, negated any expectation of privacy with respect to that information.

We hold that there is no constitutionally protected reasonable expectation of privacy in the numbers dialed into a telephone system and hence no search within the fourth amendments is implicated by the use of a pen register installed at the central offices of the telephone company. While the guarantees of the fourth amendment are broad, they are not boundless, *State* v. *Siegel*, 266 Md. 256, 292 A. 2d 86 (1972); not everything a person may want to be private is protected by the fourth amendment. As *Katz* teaches, the fourth amendment does not afford our citizens "a general constitutional right to privacy." In not imposing Title III restrictions on the use of pen registers, it is evident, as *New York Telephone* explicitly points out, that the Congress did not consider that such devices pose a threat to privacy of the same dimension as the interception of an oral communication. As the Supreme Court noted in that case, pen registers do not reveal whether a communication existed and it recognized that such devices are regularly

used by the telephone company without a court order "for the purposes of checking billing operations, detecting fraud, and preventing violations of law." 98 S. Ct. at 373. The intrusion involved in pen register surveillance is minimal; no violation of the integrity of the communication system itself is entailed; and no conversation is overheard.

Whether a telephone subscriber harbors an actual subjective expectation of privacy in the numbers which he dials is, of course, difficult to know. In all probability, he understands that his calls are placed through mechanical equipment and that some record is made. We think it unlikely that the telephone subscriber distinguishes between local or toll calls with respect to an expectation of privacy in the numbers he dials. Even if he did harbor such an expectation, we are not prepared to say on the record before us that it is one that society would recognize as reasonable and constitutionally protected.

Judgment affirmed; costs to be paid by appellant.

Eldridge, J., dissenting:

Although I recognize that the issue is a close one, I do not share the majority's view that there is no reasonable expectation of privacy in the numbers dialed into a telephone system. Consequently, I disagree with the majority's conclusion that no search within the meaning of the Fourth Amendment is implicated by the police's having a pen register installed to record the numbers dialed from the telephone at the defendant's home.

In *Katz* v. *United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967), the Supreme Court held (389 U.S. at 353, emphasis supplied):

> "The Government's activities in electronically listening to and recording the petitioner's words *violated the privacy upon which he justifiably relied while using the telephone booth* and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."

In my opinion, there similarly exists a privacy upon which one justifiably relies with respect to the telephone numbers which he dials in his own home.

Mr. Justice Harlan both joined the majority opinion in *Katz* and further explained the applicable principles in a concurring opinion, stating (389 U.S. at 361):

> "As the Court's opinion states, "the Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.' My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable."

As pointed out in the above quotation, "for most purposes" a person expects privacy in his own home. I know of no sound basis for concluding that there is an exception to this general proposition in regard to telephone numbers which a person dials on his home telephone. It is not like a conversation "in the open." When the average person dials a number in the privacy of his home, he does not contemplate, nor should he reasonably contemplate, that he is exposing the information "to the 'plain view' of outsiders."

The principles set forth by the majority and by Mr. Justice Harlan in *Katz* lead me to the conclusion that the Fourth Amendment does apply when the police have a pen register installed to record the numbers dialed from one's telephone. The same conclusion has been reached

by several cases in the United States Court of Appeal. *Application of United States For Order, Etc.*, 546 F. 2d 243, 245 (8th Cir. 1976), *cert. denied, Southwestern Bell Telephone Company* v. *United States*, 434 U.S. 1008, 98 S. Ct. 716, 54 L.Ed.2d 750 (1978); *Application of U.S. In Matter of Order, Etc.*, 538 F. 2d 956, 959 (2d Cir. 1976), *reversed on other grounds, United States* v. *New York Tel. Co.*, 434 U.S. 149, 98 S. Ct. 364, 54 L.Ed.2d 376 (1977); *United States* v. *Illinois Bell Tel. Co.*, 531 F. 2d 809, 813 (7th Cir. 1976); *United States* v. *John*, 508 F. 2d 1134, 1141 (8th Cir. 1975), *cert. denied*, 421 U.S. 962, 95 S. Ct. 1948, 44 L.Ed.2d 448 (1975); *United States* v. *Falcone*, 505 F. 2d 478, 482 n. 21 (3d Cir. 1974), *cert. denied*, 420 U.S. 955, 95 S. Ct. 1339, 43 L.Ed.2d 432 (1975).

The principal basis for the view that the use of a pen register does not constitute a search for purposes of the Fourth Amendment seems to be the conclusion of some judges that there is no justifiable expectation of privacy with respect to numbers dialed because "[t]elephone subscribers are fully aware that records will be made of their toll calls." *United States* v. *Baxter*, 492 F. 2d 150, 167 (9th Cir. 1973), *cert. denied*, 416 U.S. 940, 94 S. Ct. 1945, 40 L.Ed.2d 292 (1974). *See also Hodge* v. *Mountain States Tel. & Tel. Co.*, 555 F. 2d 254, 256, 266 (9th Cir. 1977); *United States* v. *Clegg*, 509 F. 2d 605, 610 (5th Cir. 1975). This theory is relied on by the majority in the instant case.

However, the mere fact that a person who thinks about it would realize that the numbers dialed in *completed* long distance calls would have to be recorded for billing purposes, does not, in my judgment, warrant the conclusion that no reasonable expectation of privacy exists generally with respect to telephone numbers dialed. Such calls represent only a small percentage of those made by the average individual. The overwhelming majority of calls made by the average person are local and do not involve toll charges. Moreover, as to calls outside of one's local area, many are not answered or result in busy signals. Nevertheless, the pen register records even these. Because one's expectation of privacy in a particular type

of situation may not be fully realized in a minority of instances does not necessarily make that expectation unreasonable.

The majority's attempted analogy between *United States* v. *Miller*, 425 U.S. 435, 443, 96 S. Ct. 1619, 48 L.Ed.2d 71 (1976), and the situation in the instant case is unpersuasive. In *Miller*, with regard to checks and deposit slips, the Supreme Court observed that the "depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government." But it was not the telephone company which instigated the installation of the pen register in the instant case. *Miller* is thus distinguishable by the fact that here, absent the government's intrusion, the telephone company *could* not have revealed any information to the government regarding Smith's calls. Normally the telephone company does not, in any meaningful sense, possess information about local telephone calls which it could pass on. The mere fact that machines (switching equipment) owned by the telephone company responded in certain ways to the defendant's dialing numbers cannot reasonably be construed as a transfer of information by the defendant to the telephone company. There is no indication in this case that the telephone company's machinery preserved a record of the numbers dialed, nor that any telephone company employee did or could be expected to observe the process. The defendant, by the simple act of dialing local numbers, did not reasonably intend to reveal information; he merely made use of machinery in particular ways which, without the police intrusion, would have remained fully private.

In sum, I agree with the position suggested by Mr. Justice Powell, dissenting in part in *United States* v. *Giordano*, 416 U.S. 505, 548, 553-554, 94 S.Ct. 1820, 1842, 1845, 40 L.Ed.2d 341 (1974), that the permissibility of law enforcement officials using a pen register depends upon compliance with the requirements of the Fourth Amendment.

Judge Diggens has authorized me to state that he concurs with the views expressed herein.

Cole, J., dissenting:

> Today no one perhaps notices because only a small, obscure criminal is the victim. But every person is the victim, for the technology we exalt today is everyman's master.
>
> Mr. Justice Douglass, dissenting in *United States* v. *White*, 401 U.S. 745, 757, 91 S. Ct. 1122, 28 L.Ed.2d 453 (1971).

The majority holds today that the installation of a pen register, by the telephone company, at the request of the police and without the authorization of a warrant, at is central office to record all numbers dialed from the defendant's telephone, does not constitute a search under the fourth amendment because "there is no constitutionally protected reasonable expectation of privacy in the numbers dialed into a telephone system."

I disagree and I respectfully dissent.

The issue of whether the use of a pen register is a search and must therefore comply with the standards of the fourth amendment is one of first impression in this jurisdiction. Heretofore, this Court has only addressed the question of whether government electronic interception of a conversation is a search. *E.g.*, *Carter* v. *State*, 274 Md. 411, 337 A. 2d 415 (1975); *Siegel* v. *State*, 266 Md. 256, 292 A. 2d 86 (1972); *Trovinger* v. *State*, 34 Md. App. 357, 367 A. 2d 548 (1977); *Pennington* v. *State*, 19 Md. App. 253, 310 A. 2d 817 (1973), *cert. denied*, 419 U.S. 1019 (1974); *State* v. *Graziano*, 17 Md. App. 276, 301 A. 2d 36 (1973). The pen register alone does not record "conversations," nor whether a call was completed; it only records the fact that certain numbers were dialed from a telephone. The question actually before us, then, is whether police interception of the *information* from Smith's telephone (certain numbers dialed) by means of a pen register, was a "search." [1]

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[1] Two federal circuits have held that use of a pen register constitutes a search. *See* United States v. Southwestern Bell Telephone Company, 546 F.2d 243 (8th Cir. 1976); Application of U.S. in Matter of Order, 538 F.2d 956 (2d Cir. 1976), rev'd on other

A "search" in the constitutional sense has three components: it is (1) an invasion into otherwise private or concealed areas or matters (2) by the government (3) exploring for evidence of guilt in a criminal prosecution. *See von Lusch* v. *State*, 39 Md. App. 517 387 A. 2d 306 (1978); *Minnick* v. *State*, 4 Md. App. 81, 241 A. 2d 153 (1968); *Kleinbart* v. *State*, 2 Md. App. 183, 234 A. 2d 288 (1967). Other courts have adopted similar definitions of the term "search." *See, e.g., United States* v. *Lisk*, 522 F. 2d 228 (7th Cir. 1975), *cert. denied*, 423 U.S. 1078 (1976); *United States* v. *Davis*, 482 F. 2d 893 (9th Cir. 1973); *Marshall* v. *United States*, 422 F. 2d 185 (5th Cir. 1970); *State* v. *Tully*, 166 Conn. 126, 348 A. 2d 603 (1974); *State* v. *Ashby*, 245 So. 2d 225 (Fla. 1971); *Alcorn* v. *State*, 255 Ind. 491, 265 N.E.2d 413 (1970); *State* v. *Person*, 34 Ohio Misc. 97, 298 N.E. 2d 922 (1973); *State* v. *Cundy*, 201 N.W.2d 236 (S.D. 1972), *cert. denied*, 412 U.S. 928 (1973); *Long* v. *State*, 532 S.W.2d 591 (Tex. Crim. App. 1975), *cert. denied*, 425 U.S. 937 (1976). Especially concise is the definition in *Davis, supra*, at 896-97:

> '[S]earch is a functional, not merely a physical, process.' *Lustig* v. *United States*, 338 U.S. 74, 78, 69 S. Ct. 1372, 1374, 93 L. Ed. 1819 (1949). A search begins with the planning of the invasion and continues 'until effective appropriation' of the fruits of the search 'for subsequent proof of an offense.' *Id.* The Fourth Amendment applies to a search whenever the government participates in any significant way in this total course of conduct. "The decisive factor . . .is the actuality of a share by a[n] . . . official in the toal enterprise of securing and selecting evidence by other than sactioned means.'

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grounds, sub nom. United States v. New York Telephone Co. U.S. , 98 S. Ct. 364, 54 L.Ed.2d 376 (1977). Dicta from other circuits endorse the views of Mr. Justice Powell in United States v. Giordano, 416 U.S. 505, 94 S. Ct. 1820, 40 L.Ed.2d 341 (1974) (concurring and dissenting opinion). *See* United States v. Illinois Bell Tel. Co., 531 F.2d 809 (7th Cir. 1976); United States v. John, 508 F.2d 1134 (8th Cir.), cert. denied, 421 U.S. 962 (1975); United States v. Falcone, 505 F.2d 478 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975).

A "search," therefore, is a step in a criminal investigation by the government which focuses on the gathering of *information* or clues relevant to prosecution.

Information is not restricted to the contents of oral communication. In many situations non-verbal action may be more explicit and highly relevant to a criminal investigation. Such signals may be a command to bet or not to bet, to print or not to print, to preserve or to destroy, or indeed, to stay or flee. It is only left to the investigator to understand the question being answered. I agree with the majority that conversation is protected under the teachings of *United States* v. *Katz*, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967). However, information received from monitoring Smith's telephone is also entitled to protection. Technologically, a distinction between verbal and digital transmissions is absurd. There can be no doubt that the fact that Smith made certain calls from his home telephone is highly relevant information in a criminal prosecution for obscene or annoying phone calls.

The "government action" part of the definition of a "search" is satisfied in Smith's case because the telephone company attached the pen register to Smith's line at the request of the police and was not ordered to do so by a court or acting under compulsion of a warrant. In essence, the telephone company, not conducting an independent investigation of its own, assumed the role of an agent of the government in conducting a warrantless search. The majority cites cases which on this point are inapposite. The surveillance of the defendants' telephones in *Hodge* v. *Mountain States Tel. & Tel. Co.*, 555 F. 2d 254, 256 n. 3 (9th Cir. 1977); *United States* v. *Harvey*, 540 F. 2d 1345 (8th Cir. 1976); *United States* v. *Clegg*, 509 F. 2d 605 (5th Cir. 1975); *Nolan* v. *United States*, 423 F. 2d 1031 (10th Cir. 1969); *cert. denied*, 400 U.S. 848 (1970); and *Brandon* v. *United States*, 382 F. 2d 607 (10th Cir. 1967) was conducted solely by the telephone companies, independent of gov-

ernment agencies.[2] Furthermore, in *United States* v. *Baxter*, 492 F. 2d 150 (9th Cir.), *cert. dismissed*, 414 U.S. 801 (1973); *DiPiazza* v. *United States*, 415 F. 2d 99 (6th Cir. 1969), *cert. denied*, 402 U.S. 949 (1971); and *United States* v. *Covello*, 410 F. 2d 536 (2d Cir.), *cert. denied*, 396 U.S. 879 (1969), no pen registers or blue boxes were ever used; government agencies merely subpoenaed the toll or long distance billing records routinely kept by the telephone company. *United States* v. *Fithian*, 452 F. 2d 505 (9th Cir. 1971), also involved the exercise of governmental power to subpoena telephone company records rather than governmental or telephone company surveillance of the making of calls, although the opinion is unclear as to whether the documents recorded local or toll calls, or both.[3]

The "invasion of privacy" prong of the definition of a "search" is also met in this case. While telephone companies routinely maintain records of toll and long distance calls for billing purposes, or monitor a telephone line to correct problems with services, or deal with customer complaints, local calls made by Smith on his home phone are a private matter. Routine telephone company activities do not include the monitoring of local calls because customers usually pay for basic use of equipment at a flat rate. Nor would the government routinely be privy to information concerning Smith's private local calls absent a warrant.

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[2] Although not cited by the majority in this case, two other recent Ninth Circuit decisions specifically excluded fourth amendment considerations because monitoring activities were conducted by telephone companies, independent of the government. *See* United States v. Bowler, 561 F.2d 1323 (9th Cir. 1977); United States v. Glanzer, 521 F.2d 11 (9th Cir. 1975) (per curiam).

[3] In the case *sub judice* the police obtained information about *all* of Smith's outgoing calls, not just long-distance or toll calls, as in Baxter, DiPiazza, and Covello, *supra*. The majority attempts to minimize the significance of these factual distinctions by quoting a portion of Hodge, *supra*, in which, without citing any authority other than its own opinion, the Ninth Circuit stated that the difference between a pen register's recording of all attempted outgoing telephone calls and a telephone company's routine records of completed toll and long distance calls is not of constitutional dimension. *See* Hodge, *supra*, 555 F.2d at 256-57 and n. 6.

The majority contends that a legal distinction between telephone customer expectations regarding local calls and toll calls cannot be made because subscribers have no real knowledge as to the geographic boundaries of their local calling area. This amounts to mere speculation as to what the average telephone customer knows. In addition, in Maryland, a person using the telephone must have some knowledge of his local calling zone because a special number prefix, "1," must be dialed in order just to complete in-state calls which are made to telephones outside one's local calling zone. It is also difficult to agree with this argument because it assumes that telephone subscribers are so unconcerned about the amount of their monthly bills that they pay no attention to whether they are making toll calls.

Second, the majority suggests that since all telephone calls must pass through equipment owned by the telephone company, the telephone company will have knowledge of the fact that calls were made. The majority then attempts to construct an analogy between the facts in this case and prior cases holding that transfer of information to the government by a "wired" informant, *United States* v. *White*, *supra*, or by a bank, *United States* v. *Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976), or by means of "mail covers" *e.g.*, *United States* v. *Leonard*, 524 F. 2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), or by observation in a public area, *e.g.*, *United States* v. *Hufford*, 539 F. 2d 32 (9th Cir.), *cert. denied*, 429 U.S. 1002 (1976), did not violate the fourth amendment because those defendants had no constitutionally protected expectations of privacy when they gave information to the person(s) who ultimately turned the information over to the government.

This analogy just does not hold water. In *White*, *supra*, a conversation between the defendant and an informant was relayed by the informant to the police by means of an electronic transmitter that the informant was wearing. The majority opinion in *White* stressed that because the revelation to the government was made by a "party" to conversation with the defendant, the

defendant had no justifiable or constitutionally protected expectation of privacy concerning the conversation. 401 U.S. 745 at 749. I cannot agree that the telephone company in this case was a "party" to Smith's calls in the same sense as the informant in *White*. Smith did not speak to the telephone company in the direct manner that White spoke to the informant. The telephone company was "neutral" in the telephone call. *See California Bankers Association* v. *Shultz*, 416 U.S. 21, 48-49, 94 S. Ct. 1494, 39 L.Ed.2d 812 (1974). Smith was leasing the telephone in order to make private calls from his home. If Smith had known that a pen register would be attached to his phone merely at the request of the police, without a warrant, he would have little reason to lease a "private" home phone. A home phone would afford him little more privacy than a public phone.

Similarly, in *Miller*, *supra*, the Supreme Court held that because the defendant's bank was a "party" to the instruments negotiated by the defendant, the bank's revelation of information about the defendant's accounts upon government subpoena did not implicate the fourth amendment. 425 U.S. 435 at 440. According to the Court, the defendant had no reasonable expectation of privacy in that situation. Once again, I cannot agree that the telephone company is a "party" to its customers' telephone conversations in the same sense in which a bank operates with regard to its customers' negotiable instruments, so as to render unreasonable Smith's expectation of privacy in the use of his home phone. Even if the majority's analogy to *Miller* is valid, (and I do not agree) and Smith should have expected that the telephone company could itself monitor his phone for billing purposes, to improve service to its customers, or to verify complaints, Smith nevertheless had a reasonable expectation that the telephone company would not, without the safeguards of appropriate legal process, act for the government in collecting information relevant to a criminal prosecution. *See California Bankers Association* v. *Shultz*, *supra*, 416 U.S. 21 at 52.

The majority's analogy to "mail covers" is also unconvincing. While use of the postal service involves es-

sentially public facilities where any writing on the outside of an envelope or on a postcard can be easily read by postal employees, telephones are placed in the home to provide privacy regarding the parties to and content of a conversation. The Supreme Court has repeatedly acknowledged the aura of privacy which surrounds activities in the home, as contrasted with "public" activities. *See, e.g., United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561, 96 S. Ct. 3074, 49 L.Ed.2d 1116 (1976) (Fourth Amendment context). The decision in *Miller*, *supra*, does not preclude this type of analysis because the Court in *Miller* expressly based its decision on the assumption that the documents subpoenaed were not the respondent's "private papers." *Miller*, *supra*, 425 U.S. 435 at 440. Unlike Miller, who voluntarily gave information to another "party" to his commercial transactions, his bank, and never operated on the assumption that the information was private, defendant Smith sought to maintain his privacy regarding his phone calls by placing them in his home. In contrast to the majority, I believe that the use of "mail covers" is *less* of an invasion of privacy than a pen register. The address and return address on an envelope are easily visible to anyone handling it, while use of a home phone is designed to make telephone communications a much more private matter.

The same argument also shows the weakness of the majority's reference to observations made on a public highway by the police. Smith placed these calls on his home telephone precisely to avoid "knowingly exposing" information to the public, as did the defendants in *Hufford*, *supra*, and in *United States* v. *Moore*, 562 F. 2d 106 (1st Cir. 1977).

The ultimate issue to be resolved is whether the warrantless search through electronic detection placed upon Smith's telephone violated the Fourth Amendment. The test that must be applied is one of the reasonableness of the search:

> [T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of

> privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'

Katz, supra, 389 U.S. 347 at 361; *Venner* v. *State*, 279 Md. 47, 52, 367 A. 2d 949, *cert. denied*, 421 U.S. 932 (1977).

While I would agree with the majority that it is difficult to know whether a telephone subscriber harbors an actual subjective expectation of privacy in the numbers which he dials, I would contend that the facts in this case clearly support an inference that Smith had an expectation of privacy in the local calls he made. As previously stated, a phone call placed in the home would demonstrate an expectation of privacy, in contrast to one placed from a public phone or a private phone located in someone else's home. In addition, the telephone company does not usually keep records of every local call for routine billing or service purposes. At the very least, Smith certainly had an expectation that the telephone company would not act as a government agent in monitoring his calls for purposes of a criminal investigation without appropriate legal process. That such expectation is reasonable seems undebatable.

Finally, the majority dismisses Smith's contention rather summarily by stating that "[e]ven if he did harbor such an expectation, we are not prepared to say on the record before us that it is one that society would recognize as reasonable and constitutionally protected." I emphatically disagree.

Not only is society prepared to recognize this expectation of privacy in the use of one's home telephone but society would welcome the fact that this Court would declare its recognition of the right and protect it. Stated differently, I do not believe anyone in our society would be surprised to learn that the police were illegally tapping phones, examining mail or otherwise engaging in unlawful snooping. However, they would be shocked to learn that this Court or any other court condoned, tolerated or put its stamp of approval on such practices.

The majority fails to give due weight to the impact of Watergate and its progeny, the recent revelations of

illicit surveillance conducted by the F.B.I. upon activities of various civil rights, labor and political leaders, or indeed, the potential abuse to which the pen register may be put by police authorities.[4] These factors and others have created an environment of distrust, fear and lack of confidence.

I believe society condemns any such unlawful practices and awaits the forces of good to restore the basic right of privacy which has been steadily eroded. I believe that each citizen still clings to the notion that while being deprived of his privacy, he still has the right to it and relies upon the courts to safeguard that privacy from warrantless intrusion.

Lest we forget, the heart of the fourth amendment is to protect citizens against every unjustifiable intrusion by the state upon their privacy, whatever the means employed. For the fourth amendment to remain viable, it must adjust to the times and afford protection against new forms of invasions of privacy, however sophisticated and whether they are generated through electronics or even advances in the psychic or related sciences.

In the instant case, no such intrusion was legal without proper review of a magistrate. I would recognize Smith's right of privacy and suppress the fruits of the warrantless search.

---

[4] A pen register may be subject to abuse because it may be easily converted into a wiretap by attaching headphones or a tape recorder to appropriate terminals on the pen register unit. Newer models of pen registers have automatic voice actuated switches which can automatically turn a tape recorder on and off as the telephone is used. *See* Note, *Circumventing Title III, The Use of Pen Register Surveillance in Law Enforcement*, 1977 Duke L.J. 751, 759. The pen register also has the potential of inhibiting freedom of association. If pen register data were fed into a central computer on a widespread basis, patterns of acquaintances and dealings among a substantial group of people would be available to the government. *A. Miller, Assault on Privacy, supra.* at 43.

MANDATE

COURT OF APPEALS OF MARYLAND

No. 98, September Term, 1977

MICHAEL LEE SMITH

v.

STATE OF MARYLAND

Appeal from the Criminal Court of Baltimore pursuant to certiorari to Court of Special Appeals.

Filed: October 10, 1977.

January 11, 1978: Order of Court filed setting case for reargument, etc.

July 14, 1978: Judgement affirmed, costs to be paid by appellant.

Opinion by Murphy, C.J. Digges, Eldridge and Cole, JJ., dissent.

July 14, 1978: Dissenting opinion by Eldridge, J., in which Digges, J., concurs.

July 14, 1978: Dissenting opinion by Cole, J.

STATEMENT OF COSTS:

In Circuit Court:

Record	$ 30.00
Stenographer's Costs	202.00

In Court of Appeals:

Petition Filing Fee	
Printing Brief for Appellant	Not supplied

Portion of Record Extract—Appellant .	
Reply Brief (Supplemental)	" "
Appearance Fee—Appellant	$ 10.00
Filing Fee on Appeal (Court of Special Appeals)	30.00
Printing Brief for Appellee	30.00
Portion of Record Extract—Appellee (Supplemental)	30.00
Appearance Fee—Appellee	10.00

STATE OF MARYLAND, SS:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals this fourteenth day of August, 1978.

/s/ James H. Norris, Jr.
Clerk of the Court of Appeals of Maryland

Costs shown on this Mandate are to be settled between counsel and *NOT THROUGH THIS OFFICE.*

SUPREME COURT OF THE UNITED STATES

No. 78-5374

MICHAEL LEE SMITH, PETITIONER

v.

MARYLAND

ON PETITION FOR WRIT OF CERTIORARI TO the Court of Appeals of the State of Maryland.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 4, 1978

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-5374

MICHAEL LEE SMITH,

Petitioner

v.

STATE OF MARYLAND,

Respondent

FOR RESP

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-5374

MICHAEL LEE SMITH,

Petitioner

v.

STATE OF MARYLAND,

Respondent

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

PRELIMINARY COMMENTS

This response to the Petition for Writ of Certiorari is filed pursuant to the request of this Court dated October 27, 1978.

OPINION BELOW

The decision of the Court of Appeals of Maryland in this case is now reported as Smith v. State, 283 Md. 156, 389 A.2d 858 (1978).

JURISDICTION

Petitioner has invoked Title 28, Section 1257(3) United States Code as a basis for jurisdiction in this case.

QUESTION PRESENTED

Does a pen register not constitute a search and seizure under the Fourth Amendment of the United States Constitution?

STATEMENT OF THE CASE

Respondent accepts the Petitioner's Statement of the Case.

STATEMENT OF FACTS

The facts set forth by Petitioner are accepted by the Respondent.

ARGUMENT

THE PEN REGISTER DOES NOT CONSTITUTE A SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

This Court has aptly described the limited nature of the "intrusion" which the pen register device accomplishes in United States v. New York Telephone Company, 98 S.Ct. 364 (1977), as follows:

> "Indeed, a law enforcement official could not even determine from the use of a pen register whether a communication existed. These devices do not hear sound. They disclose only the telephone numbers that have been dialed - a means of establishing communication. Neither the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed are disclosed by pen registers. Furthermore, pen registers do not accomplish the 'aural acquisition' of anything. They decode outgoing telephone numbers by responding to changes in electrical voltage caused by the turning of the telephone dial (or the pressing of buttons on pushbutton telephones) and presenting information in a form to be interpreted by sight rather than by hearing." 98 S.Ct. 369-370.

In light of the minimal extent to which the pen register "seizes" a telephone number dialed, the respondent contends that the Fourth Amendment has no application to the device. It is correct, however, that this Court found it unnecessary to decide the precise question in New York Telephone, because the government conceded the applicability of the Fourth Amendment, see 98 S.Ct. 369, f.n. 7. Likewise, in United States v. Giordano, 416 U.S. 505 (1974), the Court refused to address the constitutional issue, which again was not vital to the result. 416 U.S. 554, f.n. 4, concurring and dissenting opinion of Mr. Justice Powell.

Although there appears to be some split of authority on the subject, the cases which advert to the need for a warrant to use a pen register usually arise in two distinct ways.

Several of the "warrant" cases occurred, where the government sought to use a pen register in conjunction with a wiretap, for which a warrant was certainly needed. Besides Giordano, these cases include United States v. Brick, 502 F.2d 219 (8th Cir. 1974) and United States v. John, 508 F.2d 1134 (8th Cir. 1975), cert. den. 421 U.S. 962 (1975). In other cases the question arises where the Government, presuming or conceding the need for a warrant, has requested same from the District Court (or an order forcing the telephone company to comply with a request for pen register installation) to use the device. Illustrative cases are In Application of United States, etc., 538 F.2d 956 (2nd Cir. 1976), United States v. Illinois Bell Telephone Company, 531 F.2d 809 (7th Cir. 1976) and United States v. Southwestern Bell Telephone Co., 546 F.2d 243 (8th Cir. 1976).

Those cases which have faced the question on the merits have held that a warrant is not required before the installation of a pen register. United States v. Clegg, 509 F.2d 605 (5th Cir. 1975), and United States v. Baxter, 492 F.2d 150, 167 (9th Cir. 1973). The Ninth Circuit well explicated the reasons why a warrant for a pen register was not mandated in Hodge v. Mountain States Telephone and Telegraph Company, 555 F.2d 254 (9th Cir. 1977), a recent case involving a civil action for damages arising out of an alleged invasion of privacy:

> "A pen register record for a particular telephone contains information different from the telephone company billing records for that telephone. Telephone company billing records show only completed calls, not, as with a pen register, the numbers dialed. Furthermore, a pen register record shows the dialing of telephone numbers, which, even if completed would not be shown by billing records because the numbers are within a local dialing area. It could be argued that since no records of such calls are normally maintained, an expectation of privacy exists. This admitted difference, is not, in our view, of constitutional dimension and is more than off set by the fact that pen register records are even farther removed then billing records from the content of the communications. Viewed in the round, the information recorded by pen registers is not entitled to Fourth Amendment protection." 555 F.2d 256-257.

The concurring opinion of Judge Hufstedler also recognized that "the expectation of privacy protected by the Fourth Amendment attaches to the content of the telephone conversation and not to the fact that a conversation took place." 555 F.2d 266.

In further support of its opinion, the Maryland Court of Appeals cited Note, The Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool, 60 Cor. L.R. 1028 (1975). In that article, the commentator found two strong bases for concluding that the pen register was not a "search and seizure" controlled by the Fourth Amendment:

> "First, even assuming that a privacy expectation is in fact present, it is well settled that toll calls (and their records) are not entitled to a reasonable expectation of privacy. And, with respect to most areas of the country, there seems to be no valid distinction between the expectations associated with local calls on the one hand and those calls that crossed the local billing zone on the other hand. The majority of subscribers probably have no real knowledge as to the geographic boundaries of their 'local call' zone. Second, all telephone subscribers must utilize equipment owned by a third party...in order to place a call. It is therefore, unreasonable for a subscriber to assume that the fact of this call passing through the telephone system will remain a total secret from the telephone company. Once this assertion is accepted, it is clear that there can be no reasonable expectation of privacy from law enforcement authorities with respect to the dialed pulses detected and recorded by the telephone company." 60 Cor. L.R. 1044-1045.

Respondent respectfully suggests that the foregoing legal analysis is ample support for the the holding of the Court of Appeals of Maryland in this case.

Furthermore, Respondent adopts the reasoning of the Court of Appeals in regard to this issue. With compelling and straightforward logic, the Court of Appeals majority put forth its view as to the "reasonable expectation of privacy" in the context of a pen register:

> "While the content of a call is not revealed to the telephone company, the information as to the number dialed must necessarily be revealed, since it is through telephone company switching equipment that calls are completed. As a recipient of such information, the company may reveal it since the caller can have no reasonable ex-

> pectation that it will remain privated. In fact, the caller should have even less of a justified expectation of privacy, since unlike the disclosures in White and Miller the use of a pen register does not reveal the contents of a communication." 283 Md. 171-172.

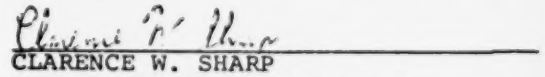
The references in the foregoing quotation are to United States v. White, 401 U.S. 745 (1971), wherein this Court held that there was no expectation of privacy in one's statement to a person who turns out to be a police informant, and United States v. Miller, 425 U.S. 435 (1976), where this Court held that a bank depositor had no reasonable expectation of privacy in the contents of checks and deposit slips turned over to the bank. The reasoning of the Court of Appeals, that the number dialed is necessarily information divulged to the telephone company, cannot be assailed. On this basis, it is submitted that the ultimate holding of the Court of Appeals is not only legally correct, but consistent with the cases decided in this Court since Katz v. United States, 389 U.S. 347 (1967), which define the "reasonable expectation of privacy" which is afforded the protection of the Fourth Amendment.

CONCLUSION

For all of the foregoing reasons, Respondent requests this Honorable Court to deny the Petition for Writ of Certiorari filed in this case.

Respectfully yours,

FRANCIS B. BURCH
Attorney General of Maryland



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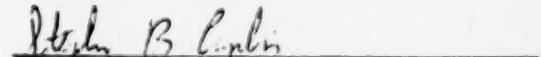

STEPHEN B. CAPLIS
Assistant Attorney General

Counsel for Respondent

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5374

MICHAEL LEE SMITH,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF PETITIONER

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IN THE

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF PETITIONER

OPINION BELOW

The Opinion of the Court of Appeals of Maryland is reported at 283 Md. 156, 389 A.2d 858 (1978) and as printed in the Appendix, infra, page A-1.

JURISDICTION

The judgment of the Court of Appeals of Maryland which is to be reviewed was dated July 14, 1978. The Petition for Writ of Certiorari was filed in this Honorable Court on September 11, 1978 and was granted on December 4, 1978.

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257 (3), and the Fourth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:

AMENDMENT IV [1971]

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT XIV [1868]

Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without,

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 5. "The Congress shall have the power to enforce by appropriate legislation, the provisions of this article."

Courts & Judicial Proceedings
Section 10-401 Declaration of Policy

"The right of people to be secure against unreasonable interception of telephonic and telegraphic communications may not be violated. The interception and divulgence of a private communication by any person not a party thereto is contrary to the public policy of the State, and may not be permitted except by Court Order in unusual circumstances to protect the state that detection of the guilty does not justify investigative methods which infringe upon the liberties of the innocent."

QUESTION PRESENTED FOR REVIEW

I. Does the installation of a pen register without a Court Order issued upon a showing of probable cause violate the Fourth Amendment of the Constitution of the United States?

AGREED STATEMENT OF THE CASE

The Petitioner, Michael Lee Smith, was charged under criminal information number 57609713 with the crime of common law robbery. The Petitioner entered a plea of not guilty and proceeded before the Trial Court sitting without the aid of a jury. At the outset, the

Petitioner's attorney advised the Court that there was no real contest as to the facts and submitted same under an Agreed Statement of Facts. However, on behalf of your Petitioner, counsel advised the Court that crucial evidence obtained by the State of Maryland was a direct result of a pen register which had been placed on the telephone of your Petitioner without the authority or authorization of a search warrant. Your Petitioner through counsel advised the Court that it was his contention that although a pen register did not have to meet the requirements of Title 18 §2510 (or similar requirements of the Annotated Code of Maryland) it could not be properly attached unless the requirements of the Fourth Amendment to the Constitution of the United States had been satisfied (i.e. the procuring of a Court Order based on probable cause).

The presentation of facts by the Assistant State's Attorney revealed that Patricia McDonough was the victim of a robbery on March 5, 1976. During that robbery her wallet, which included her name and address, was taken. After the incident, and over a period of several days Ms. McDonough received obscene and annoying telephone calls from her assailant. These telephone calls did not occur in a regular pattern.

Unable to identify her assailant by sight, Ms. McDonough began tape recording the calls with the advice and knowledge of the Baltimore City Police Department. As a result of these tapes and continuing investigation, a request by the police was made of the C & P Telephone Company to place a pen register device on the telephone lines leading from the home of the Petitioner. The telephone company voluntarily complied with this request. No search warrant or Court

Order was ever obtained by the police for the use or installation of the pen register.

The pen register recorded the telephone numbers dialed from the home of the Petitioner; but did not indicate whether the calls were completed. The telephone was listed to Robert L. Smith, the father of the Petitioner. As consequence of the pen register, and further investigation, the police were able to determine that the Petitioner was the assailant of Ms. McDonough.

The Trial Court ruled that the installation of said device did not require prior authorization nor did it violate the Fourth Amendment (Appendix) accordingly the evidence was admitted; a judgment of guilty was entered; and your Petitioner sentenced to six (6) years under the jurisdiction of the Department of Correctional Services.

With the proper guidelines and standards set up by the Maryland Rules of Procedure appeal was entered to the Court of Special Appeals of Maryland. However, the Court of Appeals of Maryland (the highest Appellate Court in the State of Maryland) issued a Writ of Certiorari on its own Motion and considered the case without benefit of Opinion by the Court of Special Appeals. The Court of Appeals rendered a four-three decision affirming the conviction of your Petitioner.

SUMMARY OF ARGUMENT

Petitioner argues that the installation of a pen register device constitutes a search and ultimate seizure

under the Fourth Amendment to the Constitution of the United States. In this case, Respondent and the Court of Appeals of Maryland concede that if the installation of such a device constitutes a search, Fourth Amendment safeguards must be satisfied before commencement of the installation procedures.

It is Petitioner's contention that "intangibles" are as much a part of the Fourth Amendment as are tangible items, *Katz v. U.S.*, 389 U.S. 347 (1967) and *U.S. v. New York Telephone Company*, 98 S.Ct. 363 (1977). The key issue is described as the two part test first described in *Katz*, that is, first—"a person must have exhibited an actual (subjective) expectation of privacy"; and second this expectation must be one "that society is prepared to recognize as reasonable."

Petitioner by his actions showed that he expected that his conduct would not be intruded upon by the "uninvited ear" by using the telephone in his house to the exclusion of all others. Analogy is made to the actions of Petitioner in the case at bar with the conduct of the accused in *Katz*. By closing the telephone door, Katz sought to exclude the public; by using the phone in the privacy of his home, Petitioner likewise sought to exclude the public.

The second prong of the *Katz* test involves a balancing of the private interest of an individual against the effect that the regulation would have on effective law enforcement. Petitioner suggests six criteria that this Court should consider to see whether society is prepared to recognize the advocated privacy interest: (1) Extent of burden placed on law enforcement, (2) possibility of abuse, (3) need for specificity in guidelines and standards, (4) recognition of individual rights and respect for those rights by law enforcement

officers, (5) "chilling effect" upon the exercise of First Amendment freedom of speech (restraint of First Amendment freedoms) and, (6) the uniqueness of pen registers and the telephone company.

Scrutiny of each of these criteria reveals the advantages of requiring a Court Order prior to installation of a pen register. The police will add a dimension of professionalism to their duties, the burden placed upon them is minimal and the possibility of abuse is dramatically reduced. In sum, freedom of speech (and association) is protected while guidelines for present situations and future technological advances have been specified.

ARGUMENT

DOES THE INSTALLATION OF A PEN REGISTER WITHOUT A COURT ORDER OR SEARCH WARRANT VIOLATE THE FOURTH AMENDMENT OF THE UNITED STATES?

The issue presented by the case of Michael Lee Smith is one which largely results from the technological advances made by our modern society. One hundred years ago, fifty years ago—even twenty-five years ago—judges and lawyers did not even dream of such a problem. In order to properly understand the issue and the ramifications it has, a brief survey of the field of electronic surveillance is necessary as well as an indepth look into where this field is taking the police officer and the individual citizen.

Law enforcement officers have a variety of electronic devices which permit them to see and hear what they might otherwise be incapable of obtaining. These

devices, it is argued, enhance the effectiveness of law enforcement; but it has been recognized that they pose serious threats to Fourth Amendment values. Recently, various Federal and State Courts have been asked to decide whether electronic surveillance by means of a pen register incur the full panoply of Fourth Amendment protections, or like traditional surveillance needs no judicial supervision.

The Courts which have considered this problem have recognized that the Fourth Amendment implications depend on the interpretation of this Court's holding in *Katz v. U.S.*, 389 U.S. 347 (1967). *Katz* modified a long line of cases that determined the validity of searches and seizures by electronic surveillance by reference to property rights. Before *Katz*, electronic interception of oral communications was permitted so long as the techniques employed did not physically invade a "constitutionally protected area". This approach proved to be inadequate, however, because it required fine distinctions concerning the degree of "penetration" necessary to cause a Fourth Amendment violation. Often the legal result turned more on the type of device available to the police than the effective reach of the surveillance itself.

Katz presented an extension of Fourth Amendment protection beyond the limits of the doctrine of "constitutionally protected areas." Although litigation in the lower Courts and arguments before this Court debated whether the surveillance involved physical intrusion into a constitutionally protected area, this Court departed from this standard on the grounds that it deflected attention from the real Fourth Amendment issues at stake.

Espousing the position "The Fourth Amendment protects people, not places", *Katz*, supra (398 U.S. at 351), the inquiry of this Court focused on the defendant's privacy rather than the location of the "bug". Rejecting the concept that privacy interest must be bound to property rights, this Court held that the privacy may also adhere to intangibles such as the defendant's conversations. Moreover, an individual may be entitled to Fourth Amendment protections in public areas as well as in the privacy of his home. In sum, the general rule was adopted as follows:

> "What a person normally exposes to the public even in his own home, is not a subject of Fourth Amendment protection. . . but what he seeks to preserve as private even in the area accessible to the public, may be constitutionally protected." *Katz*, supra, 389 U.S. at 351-2.

Applying this reasoning to the facts before it, this Court found that by shutting the door to the booth and by paying for the call the accused had taken steps to exclude the "uninvited ear"; that he had "justifiably relied" on the privacy of his conversations; and that he was therefore "entitled" to protection from electronic surveillance. As a result, use of the bugging device represented "a search and seizure" within the meaning of the Fourth Amendment.

Thus, the question posed as to whether "intangibles" can be subject to a search and seizure was answered by this Court in *Katz*. In spite of this, attorneys and courts sought to interpret the statements by this Court in *Katz* disputing and construing the question as to whether intangibles can be subject to the ordinary rules of search and seizure. This Court in the decision of *U.S. v. New York Telephone Company*, 98 S.Ct. 363 (1977) put that question to rest:

> "Indeed we recognized in *Katz v. U.S.*, 389 U.S. 347 (1967), which held that telephone conversations were protected by the Fourth Amendment, that Rule 41 is not limited to tangible items but is sufficiently flexible to include within its scope electronic intrusions authorized by a finding of probable cause, 389 U.S. at 354-356 and note 16. See also *Osborne v. U.S.*, 385 U.S. 323, 329-331 (1966).

With the issue of "intangibles" put to rest, the critical test considered by courts is the *Katz* doctrine of "Reasonable Expectation of Privacy". This test has become a two part test for determining the privacy of interests to which the Fourth Amendment extends: First, "a person must have exhibited an actual (subjective) expectation of privacy; and second, this expectation must be one "that society is prepared to recognize as reasonable." Thus when a Fourth Amendment right is asserted, courts generally have inquired whether the facts of the case, taken as a whole, justify "a reasonable expectation" that the matter sought to be preserved as private would be protected from warrantless government invasion.

It would appear that the two types of privacy are generally deemed quite reasonable: Those that are commonly asserted and those that, though less frequently claimed, nevertheless play a significant role in community life. As such, the "reasonable expectation" standard compels the courts to decide the degree of social solidarity or significance sufficient to raise a Fourth Amendment claim. In order to make this decision, the test applies no particular standards. Instead, there is a need to weigh particular privacy interests against other values such as a need for effective law enforcement.

A survey of various decisions indicates that in some cases even though privacy has been clearly invaded, the Courts may be tempted to abandon the warrant requirement and to permit warrantless searches on the basis of comparisons between the strength of the pertinent privacy interest and the need for law enforcement. In striking such a balance, courts may view the reasonableness of the privacy claim merely as an inverse function of the reasonableness of the search. For a search to be reasonable, countervailing privacy values may be considered insufficient to require strict adherence to constitutional protections.

A consequence to this approach is the potential erosion of Fourth Amendment protections because it balances an indeterminate personal value against the recognized governmental interest. An individual bears the burden of proving his privacy expectations are reasonable, that is, that they are recognized by society at large. But because privacy interests may be difficult to define, and are generally raised by those who stand convicted of a crime, it is both easy and psychologically appealing to minimize the "costs" to society permitting a warrantless search. Only the purpose of concealing crimes seems patently "unreasonable".

Thus, a first criteria which must be determined is whether the defendant exhibited an actual expectation of privacy. That is, whether the Petitioner although he obviously failed to protect his placing of the telephone call from governmental intrusion, adopted reasonable means for protecting them from the "uninvited eye or ear" of the curious stranger. By taking such action, the call itself was private with respect to the public at large and will be protected by the Fourth Amendment against the government's uninvited eye and ear.

Whether the Petitioner should have "expected" government surveillance is wholly irrelevant to this test. The only "risk" of exposure that the court regarded as significant in terms of the Fourth Amendment in *Katz* was that the members of the public might hear what was being said. Once this risk was eliminated by shutting the door of the booth, the accused was protected by the constitution from additional actions the police might take to discover his activities. Similarly, in the case at hand, by using the telephone at his home to the exclusion of all others, this petitioner (Michael Lee Smith) eliminated the risk of exposure just as *Katz* did by shutting the door of the booth.

This concept was enunciated by Judge Eldridge when he stated in dissent:

> "The principal basis for the view that the use of a pen register does not constitute a search for purposes of the Fourth Amendment seems to be the conclusion of some judges that there is no justifiable expectation of privacy with respect to numbers dialed because '[t]elephone subscribers are fully aware that records will be made of their toll calls.' *United States v. Baxter*, 492 F.2d 150, 167 (9th Cir., 1973), cert. denied, 416 U.S. 940, 94 S.Ct. 1945, 40 L.Ed.2d 292 (1974). See also *Hodge v. Mountain States Tel. & Tel. Co.*, 555 F.2d 254, 256, 266 (9th Cir. 1977); *United States v. Clegg*, 509 F.2d 605, 610 (5th Cir. 1975). This theory is relied on by the majority in the instant case.
>
> However, the mere fact that a person who thinks about it would realize that the numbers dialed in completed long distance calls would have to be recorded for billing purposes, does not, in my judgment, warrant the conclusion that no reasonable expectation of privacy exists generally with

respect to telephone numbers dialed. Such calls represent only a small percentage of those made by the average individual. The overwhelming majority of calls made by the average person are local and do not involve toll charges. Moreover, as to calls outside of one's local area, many are not answered or result in busy signals. Nevertheless, the pen registser records even these. Because one's expectation of privacy in a particular type of situation may not be fully realized in a minority of instances does not necessarily make that expectation unreasonable.

The majority's attempted analogy between *United States v. Miller*, 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976), and the situation in the instant case is unpersuasive. In *Miller*, with regard to checks and deposit slips, the Supreme Court observed that the 'depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government.' But it was not the telephone company which instigated the installation of the pen register in the instant case. *Miller* is thus distinguishable by the fact that here, absent the government's intrusion, the telephone company *could* not have revealed any information to the government regarding Smith's calls. Normally the telephone company does not, in any meaningful sense, possess information about local telephone calls which it could pass on. The mere fact that machines (switching equipment) owned by the telephone company responded in certain ways to the defendant's dialing numbers cannot reasonably be construed as a transfer of information by the defendant to the telephone company. There is no indication in this case that the telephone company's machinery preserved a record of the numbers dialed, nor that any telephone company employee did or could be expected to observe the

process. The defendant, by the simple act of dialing local numbers, did not reasonably intend to reveal information; he merely made use of machinery in particular ways which, without the police intrusion, would have remained fully private.

In sum, I agree with the position suggested by Mr. Justice Powell, dissenting in part in *United States v. Giordano*, 416 U.S. 505, 548, 553-554, 94 S.Ct. 1820, 1842, 1845, 40 L.Ed.2d 341 (1974), that the permissibility of law enforcement officials using a pen registser depends upon compliance with the requirements of the Fourth Amendment."

The courts emphasis on means and on their effectiveness in securing privacy from the public at large leads to a workable standard for determining Fourth Amendment protection. The Government must stand in the shoes of the public: It may see, know and take without a warrant, only what members of the public may see, know and take. So long as an individual has protected his privacy against intrusion by his fellow citizens, he may assume he is also protected against governmental interference. Thus, his reliance on Fourth Amendment protection is "justifiable" if the means he has employed to preserve his privacy are calculated to be effective against reasonably curious members of the public at large. Defining Fourth Amendment protection in terms of the reasonably curious person clarifies what this Court meant in *Katz* when it said: "What a person knowingly exposes to the public" is not subject to Fourth Amendment protection but "what he seeks to preserve as private. . . may be constitutionally protected."

The second portion of the reasonable expectation of privacy test is the one which has given courts more difficulty. It is also that portion of the test which is most germaine to the issue presented by this case, i.e., whether society will recognize as "reasonable" a right of privacy in the making of telephone calls and the location to which these calls are made. In this portion of the test, the question of balancing "privacy interests" against "effective law enforcement" is paramount.

A considerable number of state and federal cases have considered the issue so presented and have ruled that the pen registesr does indeed activate a search and seizure. As such, its installation requires the satisfying of Fourth Amendment safeguards. It is submitted that these cases are more carefully reasoned and that they suggest more persuasive arguments than those supporting the opposite view. Moreover, a review of the dissenting opinions in these supportive cases reveal that the concern is for more safeguards and regulations, not a reduction of them. In combination, overwhelming authority is provided for Fourth Amendment Safeguards. See: *Application of the United States of America in the Matter of an Order Authorizing the Use of a Pen Register or Similar Mechanical Device, 538 F.2d 956 (1976)*; *Application of the United States for an Order Authorizing Installation and Use of a Pen Register, U.S.A. v. Southwestern Bell Telephone Company*, 546 F.2d 243 (1976); *U.S.A. v. Illinois Bell Telephone Company*, 531 F.2d 809 (1976); *U.S.A. v. Nick John, et al*, 508 F.2d 1134 (1975); *U.S.A. v. Albert Sander Brick, et al*, 502 F.2d 219 (1974); *U.S.A. v. Billy Cecil Doolittle, et al*, 507 F.2d 1368 (1975); *U.S.A. v. Pasquale Falcone, et al*, 505 F.2d 478 (1974).

In *Application of the United States of America in the Matter of an Order Authorizing the Use of a Pen Register or Similar Mechanical Device*, 538 F.2d 956 (1976), the Court of Appeals for the Second Circuit reasoned:

> "We agree with the Seventh Circuit that a pen register order may only be issued after a showing of probable cause. We cannot concur in the view, voiced by some commentators, that pen register orders are constitutionally indistinguishable from mail covers, which are initiated by subpoena, and therefore should fall outside Rule 41."

This statement by the Second Circuit responds specifically to the argument advocated by the Respondent in its analogy to mail covers.

In *Application of the United States of America v. Southwestern Bell Telephone Company*, 546 F.2d 243 (1976), the Court of Appeals for the Eighth Circuit reviewed both sides of the argument and decided:

> "It is our view that the propriety of a pen register's usage depends entirely upon compliance with the Fourth Amendment rather than Title III."

The reasoning of the Eighth Circuit is more pertinent:

> "The court's power to order pen register surveillance is the equivalent of the power to order a search warrant and is inherent in the district court. It is clear upon the record before us that the district court issued the order based upon a showing of probable cause. We conclude that the district court's approach, with all of the attendant Fourth Amendment safeguards, was a valid exercise of authority."

The "Balancing Test" might also be described as follows: Where the effect of regulation severely reduces

effective law enforcement, individual rights may suffer; while where the effect on law enforcement is minimal, individual rights should be more keenly protected. The following opposing considerations must then be considered: (1) extent of burden placed on law enforcement, (2) possibility of abuse, (3) need for specificity in guidelines and standards, (4) recognition of individual rights and respect for those rights by law enforcement officers, (5) "chilling effect" upon the exercise of First Amendment freedom of speech (restraint of First Amendment freedoms) and, (6) the uniqueness of pen registers and the telephone company.

It is obvious that to require police officers to obtain a court order before installing a pen register device does place some burden upon them. However, when one carefully scrutinizes the extent of the burden and amount of difficulties that law enforcement officers incur one must recognize that the burden is minimal. Should pen registers be placed indiscriminately on phones of persons merely because he has been selected as a target by some overzealous police officer? No! A pen register device should be limited to those situations where sufficient information has come to law enforcement officers to justify this invasion of privacy. The amount of that information, the standard to be applied, should be that of "probable cause". Failure to require this minimal gathering of information prior to the installation of such a device would lead to the problems discussed later in this brief revealed by the Senate Subcommittee on Intelligence. The true effect of requiring a police officer to obtain a court order before installing a pen register device is *twofold*: better preparation of the case by the police officer and some

judicial overseeing of this stage of police investigation. Both of these results are in fact desirable. Yes, additional time and effect will be required on behalf of police officers; but the professionalism that it gives to the preparation of the case and the judicial overseeing of same will in the long run produce better and more efficient law enforcement.

The possibility of abuse of pen register devices has been discussed at length by judges, lawyers and laymen. This possibility of abuse was in fact, one of the major reasons advanced by Judge Cole in his strong dissent in the Court of Appeals of Maryland:

> "Finally, the majority dismisses Smith's contention rather summarily by stating that '[e]ven if he did harbor such an expectation, we are not prepared to say on the record before us that it is one that society would recognize as reasonable and constitutionally protected.' I emphatically disagree.
>
> Not only is society prepared to recognize this expectation of privacy in the use of one's home telephone but society would welcome the fact that this Court would declare its recognition of the right and protect it. Stated differently, I do not believe anyone in our society would be surprised to learn that the police were illegally tapping phones, examining mail or otherwise engaging in unlawful snooping. However, they would be shocked to learn that this Court or any other court condoned, tolerated or put its stamp of approval on such practices.
>
> The majority fails to give due weight to the impact of Watergate and its progeny, the recent relevations of illicit surveillance conducted by the F.B.I. upon activities of various civil rights, labor and political leaders, or indeed, the potential abuse to

> which the pen register may be put by police authorities.[1] These factors and others have created an environment of distrust, fear and lack of confidence.
>
> I believe society condemns any such unlawful practice and awaits the forces of good to restore the basic right of privacy which has been steadily eroded. I believe that each citizen still clings to the notion that while being deprived of his privacy, he still has the right to it and relies upon the courts to safeguard that privacy from warrantless intrusion.
>
> Lest we forget, the heart of the Fourth Amendment is to protect citizens against every unjustifiable intrusion by the state upon their privacy, whatever the means employed. For the Fourth Amendment to remain viable, it must adjust to the times and afford protection against new forms of invasions of privacy, however sophisticated and whether they are generated through electronics or even advances in the psychic or related sciences.
>
> In the instant case, no such intrusion was legal without proper review of a magistrate. I would recognize Smith's right of privacy and suppress the fruits of the warrantless search."

Abuse of electronic eavesdropping and surveillance

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[1] A pen register may be subject to abuse because it may be easily converted into a wiretap by attaching headphones or a tape recorder to appropriate terminals on the pen register unit. Newer models of pen registers have automatic voice actuated switches which can automatically turn a tape recorder on and off as the telephone is used. See Note, *Circumventing Title III, The Use of Pen Register Surveillance in Law Enforcement*, 1977 Duke L. J. 751, 759. The pen register also has the potential of inhibiting freedoms of association. If pen register data were fed into a central computer on a widespread basis, patterns of acquaintances and dealings among a substantial group of people would be available to the government. *A. Miller, Assault on Privacy, supra.* at 43.

devices was the subject matter of the 1978 hearings and findings of the Subcommittee on Intelligence and the Rights of Americans of the Select Committee on Intelligence of the United States Senate. Although the inquiry was as a result of Senate Bill 1566 dealing with Foreign Intelligence Act of 1978, the testimony and conclusions are most apropos to the case at hand. In commencing the proceedings, Senator Morgan quoted Attorney General Harlin Stone who in 1924 stated:

> "There is always a possibility that a secret police may become a menace to free government and free institutions, because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood."

Also as a preliminary, the Committee recognized that:

> "After all it was the abuse of so-called 'general warrants' and 'writs of assistance' in colonial America and 18th century England which led to the Fourth Amendment."

After exhaustive hearings, the Subcommittee reached the following conclusions:

> "The intrusiveness of these techniques has a second aspect as well. It is extremely difficult, if not impossible, to limit the interception to conversations that are relevant to the purposes for which the surveillance is placed. Virtually all conversations are overheard no matter how trivial, personal or political they might be. When the electronic surveillance target is a political figure who is likely to discuss political affairs or a lawyer who confers with his clients, the possibility for abuse are obviously heightened. . ."
>
> "Extremely personal information about the target, his family, and his friends is easily obtained from wiretaps as well as microphones. . ."

> "The highly intrusive nature of electronic surveillance also raises special problems when the targets are lawyers and journalists. . . Such wiretaps represent a serious threat to attorney-client privilege, because once they are instituted they are capable of detecting all conversations between a lawyer and his clients even though it is relating to pending criminal cases. . ."
>
> "In the absence of effective outside control, highly intrusive techniques have been used to gather vast amounts of information about the entirely lawful activities—and privately held beliefs—of large numbers of American citizens. The very intrusiveness of these techniques demands the utmost circumspection in their use. . ."
>
> "The F.B.I.'s ability to gather information without effective restraints gave it enormous power. That power was inevitably attractive to politicians, who could use information on opponents and critics for their own advantage. . . By providing politically useful information to the White House and congressional supporters, sometimes on demand and sometimes gratuitiously, the Bureau buttressed its own position in the political structure."

The above comments were specifically directed to use of wiretapping and electronic bugs but are certainly analogous to the question of a pen register. The possibility and actual abuse of the devices specifically considered by the Senate Subcommittee are the same abuses available by the user of a pen register. The Subcommittee recognized this aspect of the problem when it quoted the dissent in *Olmstead v. U.S.*, 227 U.S. 438 (1928):

> "Subtler and more far reaching means of invading privacy have become available to the government. . . (and) the progress of science in furnishing

> the government with means of espionage is not likely to stop with wiretap. Ways may someday be developed by which the government without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a juror the most intimate occurrences of the home. . . Can it be that the Constitution affords no protection against such invasions of individual security?"

And when it quoted from *Boyd v. U.S.*, 116 U.S. 16 (1886):

> "It is not the breaking of his doors, and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property. . ."

Wnat then the Subcommittee saw and found was that without strict guidelines (as opposed to vague standards) the possibility for abuse is greatly heightened. Moreover, without the specific guidelines, there is absolutely no way for law enforcement officers to properly gauge their conduct. Speculation as to what is and what is not proper is determined by a police officer whose biases and prejudices will certainly enter into his decision; and in the long run, personal rights suffer.

The Senate Committee did recognize that techniques such as the pen register can be effective and useful law enforcement devices when properly regulated and subject to specific guidelines:

> "One of the most difficult tasks in a free society like our own is the correlation between adequate intelligence to guarantee our nation's security on the one-hand and the preservation of basic human rights on the other."

In this regard, the testimony and prepared statement of David L. Watters, Washington Representative, American Privacy Foundation is most pertinent:

> "The dangerous aspect of allowing this procedure to occur outside the control of the wiretap laws is that the language of these significant court cases use the phrase 'pen registers and like devices'. The 'and like devices' opens up the gate for a host of unspecified surveillance devices which scan non-oral communications. Telex, data, multi-frequency tones, and switching and signaling functions; operations occurring on broad band trunk lines such as our toll microwave circuits."
>
> "Other than the fact that a chapter 119 wiretap order is a mite more difficult to obtain—the probable cause requirement is a bit stiffer—why all this fuss. A Court Order is a Court Order."
>
> "The bottom line significance of this whole case has never been articulated in the public. The significance hinges on the reporting requirements of the wiretap law."

It was and is the position of Mr. Watters that pen registers and like devices should fall within the confines of the wiretap law. Of course, this Court has already held that this concern is without merit. However, the fears and points raised in attempting to bring the pen register device within the wiretap statute sound even louder when we concern ourselves with regulation by means of the probable cause Court Order. The dissents in those cases which have held that a pen register falls outside of the stringent requirement of the wiretap statute asked for stricter regulation of the pen register device; to allow no regulation of such a device is to take no heed to the opinions of these learned judges.

Various comments by this Court as well as opposing counsel in their briefs filed in the case of *U.S. v. New York Telephone Company*, 98 S.Ct. 363 (1967) are pertinent to the present inquiry. In footnote seven this Court stated:

> "The Court of Appeals held that pen register surveillance was subject to the requirements of the Fourth Amendment. This conclusion is not challenged by either party and we find it unnecessary to consider the matter. The government concedes that its application for pen register order did conform to the requirements of Title III."

However, this Court went on to state that it agreed with the Court of Appeals that the Court had the power to authorize (emphasis added) the installation of pen registers. Noting that the Order in the New York Telephone Company case was predicated upon a proper finding of probable cause and that no claim was made that it was in any way inconsistent with the Fourth Amendment this Court noted:

> "The Courts of Appeals that have considered the question have agreed that pen register orders are authorized by Federal Rule of Criminal Procedure 41 or by an inherent power closely akin to it to issue search warrants under circumstances conforming to the Fourth Amendment. See *Michigan Bell Telephone Company*, supra; *Southwestern Bell Telephone Company*, supra; *Illinois Bell Telephone Company*, supra."
>
> "Although we need not decide whether Rule 57 (b) by itself would authorize the issuance of pen register orders, it reinforces our conclusion that Rule 41 is sufficiently broad to include seizures of intangible items such as dial impulses recorded by pen registers as well as tangible items."

Thus, without specifically deciding the issue, this Court in *New York Telephone Company* by dicta indicated its approval of the rationale of those cases which have found that the proper use of a pen register device requires compliance with the guidelines of the Fourth Amendment.

What is perhaps more intriguing is the arguments of opposing counsel contained in their briefs filed before this Honorable Court. The first point raised by the telephone company was that modern pen registers can easily be converted to a wiretap by merely plugging headphones or tape recorders into the pen register device. It must be borne in mind that this argument advanced by the telephone company was in an effort to convince this Court that regulation of a pen register device should be governed by Title III. The government responded to this argument as follows:

> "It is true that when a pen register is attached to a subscriber's line the same physical connection can be used to attach other equipment that can intercept oral communications. But agents who conduct pen register investigations are instructed that any monitoring of wires is unlawful and should not be attempted."
>
> "Some pen registers have jacks, as Respondent notes, that permit the attachment of other equipment sensitive to voices; without such equipment, however, the monitoring of conversations is impossible and agents are not issued the additional equipment. Moreover, when possible, any jacks are disabled from the inside before the pen registers are installed."

The government further contended:

> "All this entirely ignores that a pen register warrant authorizes, as did the warrant here, only

the installation and use of a pen register and Congress has already legislated to prevent precisely the type of abuse envisioned by the Court majority and respondent. Under Title III of the Omnibus Crime Control Act and Safe Streets Act of 1968 if a federal—or any other law enforcement officer—engaged in unauthorized wiretapping by plugging into a pen register as respondent suggest be would be subject to severe criminal sanctions and civil liability. To speculate that despite these sanctions, violations might occur, and to transform this speculation into a basis for a court's withholding authorization, is to argue against the issuance of a search warrant of any sort. One might as well say, for example, that a Court should not grant a warrant to search for a pistol in a suspected murderers apartment because the officers might conduct a general search for other items in violation of the Fourth Amendment."

The government further contended that law enforcement officers acting under a Court Order for the installation of a pen register who would violate that order by attaching headphones or otherwise "wiretapping" would be in "contempt of court". This argument is most interesting because it anticipates the argument of the Petitioner in the case at hand. Petitioner does not suggest that the use of the pen register should be prevented nor limited to Title III situations; instead, he merely states that it be subject to Fourth Amendment safeguards. One important safeguard illustrated in the brief by the government in *New York Telephone Co.* is that if the agents were to violate the court order they would be in contempt of court. This fear of court action for defiance of court order is a most important reason why Fourth Amendment warrant requirements must be imposed prior to the

installation of the pen register.

Technical advances in the field of electronic surveillance are limited only by the scope of one's imagination. What was only a seed in one's imagination yesterday is today part of the arsenal of apparatus available to the modern police agent. Even as was noted by the dissent in *Olmstead v. U.S.*, supra:

> "One day the prosecution may be able to present copies of documents contained in one's desk drawers without ever physically invading the room in which the desk is housed."

It is imperative in this age of technological advancement, that specific guidelines and standards be established to which law enforcement officers can look for guidance. Only with specificity in these guidelines and standards can there be protection of individual and privacy rights. With the establishment of reasonable guidelines and standards containing sufficient latitude, effective law enforcement is not restricted. Law enforcement officers can properly perform their duties and at the same time be well aware of the limits to which they may go.

On the other hand, so long as the standards and guidelines are reasonable, individual and privacy rights are protected; and the individual is apprised of that degree of privacy which can be enjoyed and will be protected by the courts. Thus, by establishing specific guidelines and standards—those within which the police can operate effectively and in which one's right of privacy is protected—a frame-work is established for technological advancement which will not permit nor promote unauthorized and improper invasion of privacy rights. Technological advances can be pro-

moted without fear of treading upon vague standards while the private citizen can feel secure by the protection of specific protected boundaries.

Another effect of the requirement of a court order before the installation of a pen register device might be described as "Notice". The court order operates as notification to law enforcement officers that they are approaching the cross-walk whereupon they will begin to tread upon personal and private rights of citizens. Prior to the request for the pen register order, one can assume that the law enforcement officers were engaging in traditional police activities. For whatever reason, the investigation has now led the investigating officer to the decision of seeking to attach a pen register device.

This decision should initiate in the police officer an understanding that the police investigation must be balanced by the right of individuals to enjoy a degree of privacy. Some of this privacy may be invaded, but only if the law enforcement officers take due care to restrict the invasion. By requiring that a court order be obtained based on an application supported by showing of probable cause, the police officer has been alerted that he has crossed the canyon and his actions must be more responsible. The requirement of the court order has provided some overseeing of the police officer's actions on the one hand and has alerted him to the possible invasion of privacy rights. It can then be assumed that the officer will proceed with an understanding of these rights, and more importantly with a respect for these rights. In sum, this warrant or court order requirement has echoed the teachings of the Fourth Amendment, i.e., that there shall be no search and seizure without a court order based upon a showing of probable cause.

In the majority opinion rendered by the Court of Appeals of Maryland, reference was made to the law review article contained in the Cornell Law Review (60 Cornell L.R. 1028). Specifically, reference was made to the fact that subscriber of telephone service is required to use apparatus supplied by the telephone company. It was argued by the majority (as contained within the law review article) that this bolsters the proposition that there should be no reasonable expectation of privacy in the dialing of a telephone number. To the contrary, however, the fact that the subscriber must use apparatus belonging to the telephone company enhances the argument of expectation of privacy.

If one had a choice as to whose apparatus to use, he might expect that because of varying procedures one's privacy may well be invaded. On the other hand, where the telephone company has been given a monopoly, one certainly has the right to expect that his right of privacy will be even more protected, honored and respected. Even where it is necessary for the telephone company to record phone numbers for housekeeping duties (such as long distance phone calls) the subscriber has a right to expect that such action would be taken strictly for telephone company convenience. Certainly where one has no choice as to the facility he will use, and he is well aware of the fact that the facility is regulated by government agencies (congress, state legislatures, public service commissions, etc.) this expectation that one's privacy will be respected is even more strongly augmented. Thus, this lack of choice with regards to this public utility suggests that one can expect to use the facility without the interference of the "uninvited ear".

Lastly, the failure of this Court to require a court order prior to the installation of a pen register device is to encourage a "chilling effect" upon the exercise of freedom of speech. Freedom of speech and the related concept of freedom of association are seriously affected when an individual fears that his contacts may become public. Here, reference is made to the "chilling effect", i.e. individuals shy away from contacts with others not because their conduct is illegal but because of a fear that others may infer illegality, immorality or favoring a minority viewpoint.

Under the last consideration, the Court must look at the practical aspects of the issue rather that the strictly legal aspects i.e. what effect will this Court's ruling have upon the general populus. If a police officer for whatever reason decides to install such a device he may do so under the position advocated by the Respondent. The individual citizen knowing this may well be intimidated by this possibility—he may be paranoid, he may be a political dissident, he may be an aspiring politician, he may just enjoy seclusion. Whatever the reason, he becomes fearful that he may invoke condemnation for a purely proper and innocent contact. The result is that contacts will not be made, social intercourse is destroyed, and the community is hurt.

Under the proposition urged by Petitioner, the individual is secure by the recognition that such action will not be taken unless and until a judicial officer satisfied that probable cause exists has sanctioned the actions. One recognizes that as a tool for criminal investigation the pen register device may be useful when sanctioned by the Courts and limited in its scope. In such circumstances, its potential for abuse has been

reduced; the procedures for obtaining its installation have been defined; and its "chilling effect" on freedom of speech is eliminated.

CONCLUSION

For the aforegoing reasons, it is respectfully submitted that the Petitioner's conviction and sentence be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

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MICHAEL LEE SMITH,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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ON CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENT

OPINION BELOW AND JURISDICTION

Citation to the opinion of the court below and statement of the jurisdiction of this Court are correctly set forth by Petitioner.

QUESTION PRESENTED

Does the pen register recording of telephone numbers dialed constitute a search and seizure contemplated by the Fourth Amendment to the United States Constitution?

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case set forth by Petitioner as accurate and complete.

SUMMARY OF ARGUMENT

1. Because the use of the telephone necessarily involves the divulgence of information to a third party, *i.e.*, the telephone company, there is no expectation of privacy in the telephone number dialed. Therefore, the information recorded by the pen register does not constitute a search and seizure protected by the Fourth Amendment.

2. Because the information recorded by a pen register is routinely imparted to the telephone company, and used by the telephone company for billing and other business purposes, and because society recognizes the need to curb illegal and abusive use of the telephone, there can be no reasonable, legitimate expectation of privacy in the telephone numbers dialed.

3. Neither the balancing test nor the authorities set forth by Petitioner justify finding that the pen register constitutes a search and seizure under the Fourth Amendment.

ARGUMENT

THE PEN REGISTER RECORDING OF TELEPHONE NUMBERS DIALED DOES NOT CONSTITUTE A SEARCH AND SEIZURE CONTEMPLATED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The device known as a pen register:

> "is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations." *United States v. Giordano*, 416 U.S. 505, 549 n.1 (1974) (Powell, J., concurring and dissenting).

Moreover,

> "[n]either the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed is disclosed by pen registers. Furthermore, pen registers do not accomplish the 'aural acquisition' of anything. They decode outgoing telephone numbers by responding to changes in electrical voltage caused by the turning of the telephone dial (or pressing of buttons on push button telephones) and present the information in a form to be interpreted by sight rather than by hearing." *United States v. New York Telephone Co.*, 434 U.S. 159, 167 (1977).

This case calls upon the Court to decide whether the mere recordation by a pen register of telephone numbers dialed by a telephone user constitutes a search and seizure within the scope of the Fourth Amendment. The Court of Appeals of Maryland held that it did not. That judgment should be affirmed.

The Fourth Amendment Right to Privacy

In *Katz v. United States*, 389 U.S. 347 (1967), this Court focused on the individual's expectation of privacy as the touchstone of the Fourth Amendment, noting that reference to neither "constitutionally protected area" nor physical "trespass" adequately defined the scope of the protection, and that the Fourth Amendment was not restricted to seizure of tangible items. This Court said:

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 389 U.S. at 351.

In his concurring opinion, Mr. Justice Harlan, defined a two part test to determine whether a person's privacy is protected within any given area:

> "[F]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'" 389 U.S. at 361.

In *United States v. White,* 401 U.S. 745, 752 (1971), the Court wrote: "Our problem, in terms of the principles announced in *Katz* is what expectations of privacy are constitutionally 'justifiable' — what expectations the Fourth Amendment will protect in the absence of a warrant." This articulation places emphasis on the second (objective) prong of Mr. Justice Harlan's test, a necessary emphasis since it is a defendant's subjective expectation of privacy which gives rise to the seized communication. If there is no actual expectation of privacy exhibited, however, inquiry into what is "reasonable" or "justifiable" to society in general is unnecessary. This Court recently acknowledged that:

> "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas and King v. Illinois,* ____ U.S. ____, 99 S. Ct. 421, 58 L. Ed. 2d 387, 401 n.12 (1978).

By focusing on "understandings that are recognized and permitted by society," the inquiry becomes one of whether it is reasonably foreseeable that the conduct or communication will not remain private.

Pen registers fall outside the scope of the Fourth Amendment because the use of the telephone, though the call may originate within a person's home, necessarily involves communication to a third party (the telephone company) of the number desired to be reached, and thus there is no expectation of privacy.

The necessary communication of the number dialed, for the purpose of enabling the telephone company to connect the caller with the other phone, as well as for billing and other business purposes, precludes the finding that either an actual expectation of privacy in the number dialed exists, or that society would recognize that any such expectation would be reasonable. The mere fact that the government obtains the information from a third party, who necessarily has access to it for business purposes, establishes the non-applicability of the Fourth Amendment because there can be no expectation that the number called will remain private. In short, it is reasonably foreseeable that the numbers dialed will be known by another, and that the information will be available for communication to governmental authorities.

Expectation of the individual

It is only an intrusion by governmental officials into an individual's "zone of privacy" which implications the Fourth Amendment. *United States v. Miller,* 425 U.S. 435, 440 (1976). Clearly, once an individual reveals the information to a third party, it is no longer private. The obvious indication that the number dialed on a telephone is imparted to the telephone company is that some of the numbers routinely appear on bills for long distance charges. The Court of Appeals for the Ninth Circuit concluded that "[t]he public awareness that such records are routinely maintained was held to negate any constitutionally sufficient expectation of privacy regarding the records." *Hodge v. Mountain States Telephone and Telegraph Co.,* 555 F.2d 254, 256 (9th Cir. 1977). From this basis, the Ninth Circuit continued:

> "Although a pen register record differs from telephone company billing records, we have no difficulty in now holding that the information recorded is not protected by the Fourth Amendment.

> A pen register record for a particular telephone contains information different from the telephone company billing records for that telephone. Telephone company billing records show only completed calls, not, as with a pen register, the numbers dialed. Furthermore, a pen register record shows the dialing of telephone numbers which, even if completed, would not be shown by billing records, because the numbers are within a local dialing area. It could be argued that since no records of such calls are normally maintained, an expectation of privacy exists. This admitted difference is not, in our view, of constitutional dimension and is more than offset by the fact that pen register records are even farther removed than billing records from the content of the communications. Viewed in the round, the information recorded by pen registers is not entitled to Fourth Amendment protection." 555 F.2d at 256-57.

Similar considerations highlighted the specially concurring opinion of Judge Hufstedler:

> "Like billing records, a pen register tape discloses the numbers dialed from a particular telephone and not the contents of any conversation. In fact, a pen register creates a lesser intrusion into a subscriber's privacy because, unlike billing records, a pen register tape does not indicate whether any calls were answered.
>
> True, the telephone company usually does not keep a record of local telephone calls. But most subscribers are unaware of the boundaries of their local dialing zones, especially in cities where these zones do not coincide with traditional geographic boundaries. Furthermore, it is common practice for the telephone company to keep a record of all calls dialed from a telephone which is subject to a special rate structure. Under these circumstances, subscribers do not harbor any justifiable expectation of privacy that a record will not be kept of their outgoing calls." 555 F.2d at 266 (footnote and citation omitted).

The reality that a record of all calls dialed is not "usually" kept is of no constitutional significance. The fact that the numbers dialed are imparted to the telephone company, for whatever length of time, is sufficient to negate any reasonable expectation of privacy in the information divulged. Thus, the telephone user has no legitimate expectation that the numbers he dials on a telephone will not be recorded or furnished to the authorities. By similar reasoning the Fifth Circuit has reached the same conclusion. *United States v. Clegg,* 509 F.2d 605 (5th Cir. 1975). See also *United States v. Baxter,* 492 F.2d 150 (9th Cir. 1973). That the telephone company keeps records of various aspects of telephone use is well known. *United States v. Covello,* 410 F.2d 536, 542 (2nd Cir. 1969), *cert. denied,* 396 U.S. 879 (1969). Legal commentators agree:

> "First, even assuming that a privacy expectation is in fact present, it is well settled that toll calls (and their records) are not entitled to a reasonable expectation of privacy. And, with respect to most areas of the country, there seems to be no valid distinction between the expectations associated with local calls on the one hand and those calls that cross the local billing zone on the other hand. The majority of subscribers probably have no real knowledge as to the geographical boundaries of their 'local call' zone." Note, *The Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool,* 60 Cornell L. Rev. 1028, 1044-45 (1975).

The constitutional irrelevance of a local-long distance call distinction is underscored when one considers that the signals going out from a local call are transported by the same equipment which handles long distance calls, namely, equipment maintained and owned by the telephone company. The equipment, which is the necessary conduit of all telephone calls, merely replaces the prior personal assistance of the switchboard

operator of by-gone days.[1] It is worth noting, moreover, that, since the "intrusion" is of the same magnitude whether local or long distance calls are involved, there is no greater reason to require a warrant for the recording of local numbers than for recording other numbers. Once the information is validly received by a third party, there is no Fourth Amendment bar to disclosure to governmental officials.

Thus, in *Hoffa v. United States,* 385 U.S. 293 (1966) (statements to a friend and confidante who recorded conversation for a police agent) and *Lopez v. United States,* 373 U.S. 427 (1963) (participant to a conversation recorded same for government use), this Court has recognized the inapplicability of the Fourth Amendment to instances where third parties are voluntarily made privy to acts or thoughts of the accused. See also *United States v. White,* 401 U.S. 745 (1971).

A more recent example of this limitation upon the scope of the Fourth Amendment is found in *United States v. Miller,* 425 U.S. 435 (1976), wherein the Court held that a bank depositor had no Fourth Amendment interest in the contents of checks and deposit slips turned over to his bank. In language strikingly appropriate to this case, the Court said:

> "The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government . . . This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." 425 U.S. at 443.

[1] In line with this thesis:

> ". . . all telephone subscribers must utilize equipment owned by a third party, the telephone company, in order to place a call. It is, therefore, unreasonable for a subscriber to assume that the fact of his call passing through the telephone system will remain a total secret from the telephone company. Once this assertion is accepted, it is clear that there can be no reasonable expectation of privacy from law enforcement authorities with respect to the dial pulses directed and recorded by the telephone company." 60 Cornell L. Rev. at 1045.

We emphasize that *Miller* found no privacy interest in the *contents* of deposit slips and checks, a more intrusive disclosure than is involved here. In this case, no information as to the contents of the telephone calls was recorded or revealed by the third party to the police — the information given to the police was limited to the fact that certain numbers were dialed on certain dates. Moreover, the bank depositor in *Miller* might have some notion that he and the bank with which he decides to deal might have some special contractual or fiduciary relationship. No such "special" relationship could reasonably be thought to exist between phone user and the phone company. Everyone in a given community must use the local telephone company if one desires to use a telephone. As the Court below said:

> "While the content of a call is not revealed to the telephone company, the information as to the number dialed must necessarily be revealed, since it is through telephone company switching equipment that calls are completed. As a recipient of such information, the company may reveal it since the caller can have no reasonable expectation that it will remain private. In fact, the caller should have even less of a justified expectation of privacy, since unlike the disclosures in *White* and *Miller* the use of a pen register does not reveal the contents of a communication." 283 Md. at 172.

The majority below also pointed out that mail covers, the process by which postal inspectors copy information from the outside of sealed envelopes traveling through the mails, have been upheld on several occasions. See, for example, *Lustiger v. United States,*

386 F.2d 132 (9th Cir. 1967), *cert. denied,* 390 U.S. 951 (1968), *United States v. Leonard,* 524 F.2d 1076 (2nd Cir. 1975), *cert. denied,* 425 U.S. 958 (1976), and *United States v. Balistrieri,* 403 F.2d 472 (7th Cir. 1968). Again, by revealing the identify of the parties, the mail cover elicits more information than that obtained by the pen register, which does not identify the caller, or indicate if the call is even completed.

Thus, there can be no actual expectation that the numbers one dials will remain private. But even if there were such an expectation, society has not recognized it as justifiable or reasonable.

Reasonableness of Privacy Expectation

The reasonableness of any subjective expectation of privacy in the telephone numbers dialed must be analyzed in the context of the climate in which it occurs. Because some numbers are routinely recorded by the telephone company and because the telephone company itself utilizes the pen register when necessary to investigate customer complaints about annoying calls, Respondent submits that no expectation of privacy is constitutionally justifiable.

The public concern with telephone abuse — harassing, annoying, threatening and obscene telephone calls[2] — prompted Congress and state legislatures to enact criminal penalties for abusive calls.[3] Society has legitimized the use of the pen register by recognizing that techniques must be developed and employed to

[2] In Maryland alone, "750,000 complaints received throughout the system in 1969 grew to 1.2 million by 1974". *Von Lusch v. C & P Telephone Company,* 457 F. Supp. 814, 817 n.2 (D. Md. 1978).

[3] This legislation, 47 U.S.C. Section 223, is fairly comparable to the Maryland Telephone Abuse Statute, Article 27, Section 555A, Annotated Code of Maryland, and the

detect the parties responsible for the abusive calls. Societal recognition that the telephone company will employ those techniques, including the pen register, based upon customer complaints and, when evidence is gathered, that the company will divulge it to the authorities, indicates that an expectation of privacy for the numbers dialed is not reasonable or justifiable. If it is accepted that the telephone company will record numbers to detect misuse of the telephone, it is unreasonable to expect that any particular call dialed will remain private.

The report of the Interstate and Foreign Commerce Committee of the House of Representatives, in support of legislation prohibiting telephone abuse, makes the following observation:

> "[I]t should be noted that none of these techniques [for tracing or recording such calls] requires

following Statutes in effect in 49 states at the present time. These states are as follows:

Ala. Code tit. 37, § 37-8-214; Alaska Stat. § 11.45.035; Ariz. Rev. Stat. § 13-2916; Ark. Stat. Ann. § 41-1437; Cal. Penal Code § 653m (West); Colo. Rev. Stat. § 18-9-111; Conn. Gen. Stat. § 53A-183; Del. Code tit. 11, §§ 1311, 1312; Fla. Stat. § 365.16; Ga. Code § 104-9901; Haw. Rev. Stat. § 711-1106; Idaho Code §§ 18-6710, 6711; Ill. Rev. Stat. ch. 134, §§ 16.4, 16.5; Ind. Code § 10-4944; Iowa Code § 708.7; Kan. Stat. § 21-4113; Ky. Rev. Stat. § 436.107; La. Rev. Stat. Ann. § 285; Me. Rev. Stat. tit. 17, § 3703; Md. Ann. Code, art. 27, § 555A; Mass. Stat. Ann. § 28-364; Minn. Stat. § 609.79; Miss. Code Ann. § 97-29-45; Mo. Rev. Stat. § 565.090; Mont. Rev. Codes Ann. § 94-8-114; Neb. Rev. Stat. § 28-1127; Nev. Rev. Stat. § 201.255; N.H. Rev. Stat. Ann. § 644:4; N.J. Rev. Stat. § 170-29; N.M. Stat. Ann. § 30-20-12; N.Y. Penal Law (McKinney) § 240.30; N.C. Gen. Stat. § 14-196; Ohio Rev. Code Ann. § 4931.31 (Page); Okla. Stat. tit. 21, § 1172; Or. Rev. Stat. § 166.065; 18 Pa. Cons. Stat. Ann. § 5504 (Purdon); R.I. Gen. Laws § 11-35-17; S.C. Code § 16-17-430; S.D. Compiled Laws Ann. §§ 49-31-31 *et. seq.*; Tenn. Code Ann. § 39-3011; Tex. Penal Code Ann. tit. 9, § 476 (Vernon); Utah Code Ann. § 76-9-201; Vt. Stat. Ann. tit. 13, § 1027; Va. Code § 18.2-427; Wash. Rev. Code § 9.61.230; W. Va. Code § 61-8-16; Wis. Stat. § 947.01; Wyo. Stat. § 6-4-612.

> monitoring the content of conversations on the calling or called person's line." H.R. Rep. No. 1109, 90th Cong., 2nd Sess. 21, *reprinted in* [1968] U.S. Code Cong. & Ad. News 1915, 1916-17.

The discussion does not mention a need for probable cause or a search warrant before activating the equipment. Even if the foregoing comment is confined to activity undertaken by the telephone company alone, it is yet an acknowledgment that the techniques are acceptable to the Congress of the United States, the duly elected representatives of the people of the United States, so long as the conversations are not overheard. As this Court observed in *New York Telephone Company, supra:* "The Company concedes that it regularly employs such devices without court order for the purposes of checking billing operations, detecting fraud, and preventing violations of law." 434 U.S. at 174-175.

One writer has even hailed judicial approval of such devices (in the context of denying civil liability of a telephone company sued by phone users claiming an invasion of privacy because pen registers were employed on their telephone lines as a result of complaints from other telephone customers) as "a victory for the privacy of the vast majority of telephone customers." Claerhout, *The Pen Register,* 20 Drake L. Rev. 108, 117 (1970). Commenting upon two cases from Texas, *Carswell v. Southwestern Bell Telephone Company,* 449 S.W.2d 805 (Tex. Civ. App. 1969) and *Jarvis v. Southwestern Bell Telephone Company,* 432 S.W.2d 189 (Tex. Civ. App. 1968), the writer noted:

> ". . . as long as the telephone company follows its strict standards in refusing to disclose pen register evidence to persons not a party to the telephone call, except, of course, to lawful authority, it will not be subjected to civil liability." 20 Drake L. Rev. at 116.

Similarly, other jurisdictions have condoned the use of pen registers by the telephone company for the avowed purpose of ferreting out violations of the law, *Coleman v. District of Columbia,* 250 A.2d 555 (D.C. App. 1969), *Harmon v. Commonwealth,* 166 S.E.2d 232 (Va. 1969), *People v. Schneider,* 257 N.Y.S.2d 876 (N.Y. 1965), and *State v. Cyr,* 389 A.2d 834 (Me. 1978). See also *Hodge v. Mountain State Telegraph and Telephone Co., supra,* and *Von Lusch v. C & P Telephone Co., supra. Von Lusch* was partly decided upon the finding of the trial court that the pen register "cannot violate Fourth Amendment rights", 457 F. Supp. at 818. It is therefore evident that pen registers are in widespread use to combat the equally widespread phenomenon of abusive use of the telephone and that the telephone company divulges all relevant information obtained to the police for purposes of investigation, arrest, and prosecution. Respondent has found no cases (and Petitioner notes none) where the telephone company has indiscriminately given lists of all calls made by the suspect to the authorities, or where the telephone company and police have connived to convert a pen register into a wiretap. No contention is made in the present case that either form of abuse occurred. Furthermore, the routine use of the pen register by the telephone company and judicial approval thereof demonstrate that, contrary to Petitioner's assertion, society has not sought to prevent the use of the pen register without prior judicial approval as a general proposition.

In sum, given the non-existent basis upon which to assert an actual (subjective) expectation of privacy and the recognition that pen registers are routinely employed by the telephone company to detect telephone abuse, the privacy interest with which the Fourth Amendment is concerned is absent.

Petitioner's assertion that the decision in this case depends on the resolution of a balancing test assumes Fourth Amendment applicability. Respondent submits that the foregoing argument establishes that pen registers do not abridge any legitimate expectation of privacy and urges this Court not to be misled by Petitioner's argument that, as a policy matter, searches conducted pursuant to a warrant are to be preferred to warrantless intrusions.

An examination of the factors, moreover, does not militate in favor of imposing a warrant requirement as a policy matter. The possibility of abuse is minimal given the telephone company procedures and statutes[4] limiting disclosures. Validating the warrantless use of pen registers will not automatically lead to warrantless use of more intrusive devices. The unique and limited nature of the device, which can neither identify the parties to the call nor overhear any communication, guarantees that its use will not adversely affect the exercise of free speech or any individual privacy right. On the other hand, the burden on law enforcement, if a warrant requirement is imposed, will be substantial. The time necessary to secure the warrant, assuming probable cause exists, may well destroy any hope of securing the needed evidence. And the usefulness of the device will be eliminated entirely in cases where reasonable suspicion, but not probable cause, exists. In short, even a balance of the policy factors argued by Petitioner does not justify imposition of the warrant requirement. The severely limited nature of the information revealed and recorded by a pen register is simply not intrusive enough to offset the factors which clearly weigh against imposing such a requirement.

[4] See, *e.g.*, 47 U.S.C. Section 605, prohibiting interception of communications by the telephone company except under very limited circumstances, and 18 U.S.C. Section 2520, governing analogous misconduct by police authority. Comparable Maryland law is found at Code, Courts and Judicial Proceedings Article, Section 10-410.

The courts which have addressed the issue squarely have concluded that the pen register is not a Fourth Amendment intrusion. Just as this Court has twice found it unnecessary to decide the question posed in this case, *United States v. Giordano*,[5] *supra*, and *United States v. New York Telephone Company*,[6] *supra*, so have other courts where the need for Fourth Amendment compliance was not challenged. Petitioner's reliance on those cases is therefore misplaced.

In *Application of the United States of America, In the Matter of an Order Authorizing the Use of a Pen Register or Similar Mechanical Device*, 538 F.2d 956 (2nd Cir. 1977), the case ultimately decided by this Court *sub nom. New York Telephone Co., supra*, the government conceded the applicability of the Fourth Amendment: "[T]he government argues that a District Court has inherent authority or power under Rule 41 F.R.C.P. to issue such an order [for placement of a pen register], subject only to the restraints of the Fourth Amendment." 538 F.2d at 959.

Similarly, in *United States v. Illinois Bell Telephone Co.*, 531 F.2d 809, 812 n.6 (7th Cir. 1976), the government sought a court order to compel a reluctant telephone company to install a pen register, and the

[5] "The Government suggests that the use of a pen register may not constitute a search within the meaning of the Fourth Amendment. I need not address this question, for in my view the constitutional guarantee, assuming its applicability, was satisfied in this case." 416 U.S. at 554, n.4 (Powell, J., concurring and dissenting).

[6] "The Court of Appeals held that pen register surveillance was subject to the requirements of the Fourth Amendment. This conclusion is not challenged by either party, and we find it unnecessary to consider the matter . . ." 434 U.S. at 165 n.7.
Despite the disclaimer by this Court, one Circuit, in the context of a civil suit for invasion of privacy, has found *New York Telephone Co.*, to hold that there is "no federal bar to the use of a pen register without a warrant." *Martin v. DeSilva*, 566 F.2d 360 (1st Cir. 1977).

company did not question the presence of probable cause. And, in *United States v. Southwestern Bell Telephone Co.*, 546 F.2d 243 (8th Cir. 1976), because the government was seeking a court order to secure telephone company cooperation, the need for probable cause was simply not questioned.

The other cases cited by Petitioner all involve use of a pen register in conjunction with a wiretap for which Title III authorization had already been obtained, *United States v. Brick*, 502 F.2d 219 (8th Cir. 1974), *United States v. John, et al.*, 508 F.2d 1134 (8th Cir. 1975), *cert. denied*, 421 U.S. 962 (1975), *United States v. Falcone*, 505 F.2d 478 (3rd Cir. 1974), *cert. denied*, 420 U.S. 955 (1975), and *United States v. Doolittle*, 507 F.2d 1368 (5th Cir. 1975), *cert. denied*, 423 U.S. 1008 (1974). As the *Falcone* court acknowledged: "[n]or must we decide, under the facts of this case, what authorization is necessary when a pen register is used alone." 505 F.2d at 482.

CONCLUSION

When one considers the limited nature of the intrusion, the specific uses to which the pen register is put, the routine use of the device by the telephone company with accompanying privacy safeguards, the knowledge of the subscriber that some recordation of his dialed numbers does routinely occur, the use of the phone company equipment by the subscriber, the comparison of the pen register to mail covers and bank deposits, and the limited but persuasive authority on the Fourth Amendment question, one must conclude that the Court of Appeals of Maryland reached the correct result. Respondent prays that the judgment of the Court of Appeals of Maryland be affirmed.

Respectfully submitted,

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